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The Gift of
Hon. Charles Sumner
of Boston,
(H. C. 1830,)
22 July, 1864.

Hon: Charles Sumner
with best regards of J. B. Moran

IN THE COURT OF EXCHEQUER CHAMBER AT WESTMINSTER,

THE 6TH AND 8TH FEBRUARY 1864.

BEFORE

LORD CHIEF JUSTICE COCKBURN,
LORD CHIEF JUSTICE ERLE,
MR. JUSTICE CROMPTON, | MR. JUSTICE MELLOR,
MR. JUSTICE BLACKBURN, | MR. JUSTICE WILLIAMS,
AND MR. JUSTICE WILLES.

THE ATTORNEY GENERAL *v.* SILLEM AND OTHERS,

Claiming the Vessel "ALEXANDRA," seized under the Foreign Enlistment Act,

(59 George III. Chapter 69.)

REPORT OF THE ARGUMENT

ON

The preliminary Objection to the Jurisdiction of the Exchequer Chamber, in Appeal under the New Rules of the Court of Exchequer, applying the Common Law Procedure Acts to the Revenue Side of that Court.

TOGETHER WITH

THE JUDGMENT OF THE COURT,

AND ALSO

AN APPENDIX CONTAINING THE RULES AND SECTIONS OF THE STATUTES REFERRED TO, AND AN ABSTRACT OF THE CASE ON APPEAL TO THE EXCHEQUER CHAMBER.

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IN THE COURT OF EXCHEQUER CHAMBER AT WESTMINSTER.

BEFORE

LORD CHIEF JUSTICE COCKBURN,
LORD CHIEF JUSTICE ERLE,
MR. JUSTICE CROMPTON, | MR. JUSTICE MELLOR,
MR. JUSTICE BLACKBURN, | MR. JUSTICE WILLIAMS,
AND MR. JUSTICE WILLES.

THE ATTORNEY GENERAL *v.* SILLEM AND OTHERS,

Claiming the Vessel "ALEXANDRA."

ARGUMENT

On the preliminary Objection to the Jurisdiction of the Exchequer Chamber on Appeals under the New Rules* of the Court of Exchequer applying the Common Law Procedure Acts to the Revenue Side of that Court.

Saturday, 6th February 1864.

Argument on objection to new Rules made by Court of Exchequer.

Sir Hugh Cairns.—My Lords, in this case, I have to submit to your Lordships a preliminary objection as to the jurisdiction of this Court to entertain this Appeal, on objection of which we have given notice to the advisers of the Crown, and I will state in as few words as possible the facts of the case which will explain to your Lordships the nature of the objection.

My Lords, the proceeding in this case in the Court of Exchequer originated in the seizure by the Crown of a ship called the "Alexandra." She was seized as forfeited to the Crown; thereupon, my Lords, a claim was made by those whom I represent, some English merchants, to the property of the ship. An information was filed in the usual way by the Attorney General, an information *in rem*, alleging the forfeiture and the cause of forfeiture. The fact of the forfeiture was traversed by the claimants also in the usual way and issue joined. My Lords, the case was tried upon that issue before a jury, and the jury found a verdict against the Crown. Thereupon the *postea* in the usual way was delivered to the claimants. In the beginning of Michaelmas Term the claimants were served with a rule *nisi* for a new trial upon the ground of the verdict being against evidence, against the weight of evidence, and upon the ground of misdirection and non-direction by the learned Judge. My Lords, that rule was argued in the Court of Exchequer. The Court were equally

* *Vide* Appendix, page i.

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divided in opinion, and an order was made, as is usual under those circumstances, discharging the rule. Thereupon, my Lords, of course, as your Lordships will see, the whole of the proceedings in the Court of Exchequer were at an end. The Court had further merely to perform the ministerial act of entering up whatever may be the proper form of judgment to be entered up in such case. We have since that been served with notice of appeal to the Court of Exchequer Chamber, which brings us before your Lordships this morning; and, my Lords, the question which we ask under those circumstances is, under what authority is that appeal brought?

My Lords, before the Common Law Procedure Act, I need not mention what is obvious, there could have been no such appeal. Under those Acts there could be no such appeal, for, as is well known to your Lordships, those Acts apply to personal actions commencing by writ of summons, and to those only. But, my Lords, we understand that it is said that a rule has been made by the Court of Exchequer which gives an Appeal in the present case, and we are told that that rule is a general rule, or Order of Court, dated the 4th of November of last year. My Lords, we understand,—I know not whether it is correct information, for we have it only from the ordinary sources of information,—that this rule was made by the Court on an application by the advisers of the Crown in the present case, before the rule *nisi* to which I have referred, was obtained from the Court. My Lords, I am sure that if that is so, and our information is correct, the very learned and eminent Judges who made the rule proceeded upon considerations of the highest policy and fitness in their own minds; but, at the same time, one cannot help thinking that the course of making a rule, apparently general in its terms and applying to all cases, upon the application of a party to one particular case, and to meet that particular case, in a course which may be attended in some cases by danger and by inconvenience.

However, my Lords, the rule is this:—It professes to be made in pursuance of an Act of Parliament to which I will in a moment refer; but I would first take leave to read the rule to the Court. It is headed "Court of Exchequer, Revenue side. In pursuance "of the provisions contained in the 26th section of the 22nd and "23rd of Victoria, chapter 21, entituled 'An Act to regulate the "office of Queen's Remembrancer, and to amend the practice and "procedure on the Revenue side of the Court of Exchequer,' "it is ordered that the following provisions of the Common Law "Procedure Act, 1854, be extended, applied, and adapted to the "Revenue side of the Court of Exchequer, and also that the fol-"lowing rules as to giving bail in cases of appeal shall be in force "on the Revenue side of the Court of Exchequer." The first rule, my Lords, is this: "In all cases of rules to enter a verdict or non-"suit, upon a point reserved at the trial, if the rule to show cause "be refused or granted, and then discharged or made absolute, the "party decided against may appeal." Secondly, "In all cases of "motions for a new trial upon the ground that the Judge has not

"ruled according to law, if the rule to show cause be refused, or, "if granted, be then discharged or made absolute, the party "decided against may appeal, provided any one of the Judges "dissent from the rule being refused, or when granted being "discharged or made absolute, as the case may be, or provided "the Court in its discretion think fit that an appeal should be "allowed, provided that where the application for a new trial is "upon matter of discretion only, as on the ground that the "verdict was against the weight of evidence, or otherwise, no "such appeal shall be allowed." Thirdly, "The Court of Error, "the Exchequer Chamber, and the House of Lords shall be "Courts of Appeal for this purpose." My Lords, I might pause for a moment to observe there an inaccuracy in this rule, although it is not a serious objection of course to the rule, but it shows what one has reason to regret, that a little more consideration had not been bestowed upon the rules. It is obvious that there has been an entire overlooking of what the meaning of the term "Court of Error," in the Common Law Procedure Act is. The Common Law Procedure Act, in the section which is supposed to be analogous to that which I have read, is this: "The Court of "Error, the Exchequer Chamber, and the House of Lords shall "be Courts of Appeal for the purposes of this Act." The rule says, "The Court of Error, the Exchequer Chamber, and the "House of Lords shall be Courts of Appeal for this purpose."

Lord Chief Justice Cockburn.—Which section are you referring to?

Sir Hugh Cairns.—It is the Act of 1854, section 36. The Common Law Procedure Act said, "For the purposes of this "Act." The rule says, "for this purpose," namely, for the purpose of the appeal before mentioned. The clause is utterly unmeaning so applied. I mean that that part of the clause which contains the term "the Court of Error," in the Common Law Procedure Act, has a meaning quite different from the term "Exchequer Chamber," and a most intelligible and necessary meaning,—for the Common Law Procedure Act applied not merely to the Superior Courts at Westminster, but to the Court of Lancaster and to the Court of Durham, and it might be made applicable by order of Her Majesty in Council to other inferior Courts of Record. As to those inferior Courts of Record, the Court of Queen's Bench was the Court of Error, and therefore said, and rightly said, the Common Law Procedure Act, "the Court of Error, the Exchequer Chamber, and the House "of Lords, as the case may be, for the purposes of this Act," which in all those various purposes, shall be the Court of Appeal; but in this rule it is for the appeal mentioned in the clause immediately before. "The Court of Error" could have no meaning, introduced as it is into this 3rd rule; but that, my Lord, is a digression and not a serious objection to the rules.

The fourth rule is, no appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to the Queen's Remembrancer within four days after the decision complained of, or such further time as may be allowed

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by the Court or a Judge. 5th. The appeal herein-before mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the Court or a Judge of the Court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to as may be necessary to raise the question for the decision of the Court of Appeal. 6th. When the appeal is from the refusal of the Court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal. 7th. The Court of Appeal shall give such judgment as ought to have been given in the Court below, and all such further proceeding may be taken thereupon as if the judgment had been given by the Court in which the Record originated. 8th. The Court of Appeal shall have power to adjudge payment of costs, and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process and otherwise. Upon an award of a trial *de novo* by the Court, or by the Court of Error upon matter appearing upon record, error may at once be brought; and if the judgment in such or any other case be affirmed in error it shall be lawful for the Court of Error to adjudge costs to the defendant in error. 10th. When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event unless the Court shall otherwise order. I need not read the 11th or the 12th. The 11th is as to using affidavits, and the 12th says that notice of appeal shall be a stay of execution upon bail being given to pay the sum recovered in the same manner and to the same amount as bail in error is required to be given.

Well, my Lords, all this may be so. It may be that the Court of Exchequer may have power by a general order to create a new Court of Appeal, to give new rights to suitors with regard to appeal which they never had before, to order what shall and shall not be done by the Court of Appeal and by the House of Lords, and to confer upon the House of Lords and upon your Lordships the powers which are proposed to be conferred by those rules. All that may be so; but, at all events, let us see the authority; for I suppose no person would say that without Parliamentary authority, that is a power which could have been exercised.

Now, my Lords, I come to the Act of Parliament. It is the 22nd and 23rd of Victoria, chapter 21. My Lords, this Act is styled "An Act to regulate the office of Queen's "Remembrancer, and to amend the practice and procedure "on the Revenue side of the Court of Exchequer." It recites that a certain Act had been passed with regard to the office of Remembrancer, and that certain gentlemen filled the office; and then it continues, "And whereas it is expedient "further to regulate the said office, and to make other pro-"vision in relation thereto, and to the procedure on the "Revenue side of the said Court."* My Lords, I pause there for the purpose of observing that of course the preamble cannot

* *Vide* Appendix, p. v.

restrain the Act of Parliament, if there are express provisions afterwards going beyond it; and, so far as there are express provisions going beyond this preamble, they will be quite intelligible, and not in any way at variance with what we might expect; but where we have not express provisions going beyond the preamble, the preamble is, for the purpose of the Act, to regulate the procedure on the Revenue side of the Court of Exchequer. Now I will pass over, with your Lordships' permission, the first eight sections which relate to matters connected with the Remembrancer's office, and so on, not bearing on the present question; and I ask your Lordships' attention first to the 9th clause. The 9th clause is this,—" Section 222 of the Common Law Procedure " Act, 1852, for the amendment of defects and errors in any " proceeding in civil causes, and concerning the costs and terms " of such amendment, shall extend to all suits and proceedings " on the Revenue side of the Court of Exchequer." Then the 10th clause is this: " In any suit or proceeding on the Revenue " side of the Court of Exchequer, the parties may, at any time " before judgment, by consent and order of a Judge, state any " question or questions of law in a special case for the opinion " of the Court, without pleadings, and upon judgment thereon " error may be brought as on a judgment on a special verdict, " unless the parties agree to the contrary, and the proceedings " for bringing a special case before the Court of Error shall, as " nearly as may be, be the same as in the case of a special ver- " dict, and the Court of Error shall either affirm the judgment, " or give the same judgment as ought to have been given in the " Court in which it was originally decided, the said Court of " Error being required to draw any inferences of fact from the " facts stated in such special case, which the Court below ought " to have drawn." That section, my Lords, is virtually an incorporation of two sections of the Common Law Procedure Acts, the one section 42 of the Act of 1852, the other, section 32 of the Act of 1854. And we see thus how Parliament deals with the Court of Error as to cases beginning on the Revenue side of the Court of Exchequer. It treats the Court of Exchequer as one Court, it treats the Court of Appeal, or the Court of Error, as the other. Parliament confers on the suitors the right of bringing error upon a special case before the Court of Error, and Parliament exercises the jurisdiction of saying what the Court of Error shall do with reference to that case. The 11th clause, my Lords, is " In case no agreement shall be entered into as to the costs of " such special case and proceedings, the costs shall follow the event, " and be recovered by the successful party." Then the 12th clause, my Lords, may be referred to: " In cases of appeal from the assess- " ment of the Commissioners of Inland Revenue to the Court of " Exchequer, made under the provisions of the Succession Duty " Act, 1853, the party decided against may appeal from the de- " cision of the Court upon a case to be stated by the parties, or, if " they differ, to be settled by the Court or a Judge thereof, or any " officer to whom the Court may think proper to refer the same;

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" and the Court of Appeal shall give such judgment as ought " to have been given by the Court of Exchequer, and shall have " power to adjudge the payment of costs." Clause 13, " Such " appeal as aforesaid shall be made to the Court of Error in " the Exchequer Chamber, and the decision of the said Court " of Error shall be subject to appeal to the House of Lords." Clause 14, " No such appeal shall be allowed under this Act " unless notice thereof be given in writing to the opposite party " or attorney, and to the proper officer of the Court, within four " days after the decision complained of, or such further time as " may be allowed by the Court or Judge." Then, my Lords, there comes in section 15 a provision for appeal in summary proceedings for Legacy or Succession Duty, and your Lordships will see that at the end of that clause it states: " The Court " may proceed to give judgment on such case and for any amount " of duty the Court are of opinion may be due to the Crown, and " for costs, in like manner as on a verdict on information, and on " such judgment error may be brought and judgment given, as " on a special case stated by consent."

Then, my Lords, I pass on to the 18th section, and we find in the 18th and following sections the provisions of the Common Law Procedure Act, 1852, as to error in the proper and strict sense of the term, the proceedings which formerly commenced by a writ of error, and we find those provisions of the Common Law Procedure Act, 1852, adopted by Parliament, and applied by Parliament by its authority to the Revenue side of the Court of Exchequer. The 18th section is this: "No judgment in any cause " on the Revenue side of the Exchequer shall be reversed or " avoided for any error or defect therein, unless error be com- " menced or brought and prosecuted with effect within six years," with a proviso with regard to parties under disability. That section answers to the 146th and 147th of the Common Law Procedure Act, 1852. Then the 19th section is, " A writ of error shall " not be necessary or used in any suit or proceeding in error on " the Revenue side of the Court of Exchequer, and the proceed- " ing to error shall be a step in the cause, and shall be taken in " manner and subject as to such terms and conditions as to " giving bail or security as may be directed by any rule or order " made by the Barons under this or any other Act or Acts " of Parliament authorizing the same: Provided, that nothing " herein contained shall invalidate any proceedings already taken." That is the 148th section of the Common Law Procedure Act, with a special interpolation, authorizing the Barons of the Exchequer to make a rule as to giving bail or security.

Then the 20th clause is, " Either party may tender a bill of " exceptions on the trial of any issues arising on the Revenue " side of the Court, and the like proceedings may be had and taken " thereon as in such cases between subject and subject."

My Lords, up to this time we have found Parliament taking up every proceeding in the Common Law Procedure Acts with regard to the Courts of Error, minus one; all but that one proceeding

which the Common Law Procedure Act, 1854, provides in the event of rules for new trials being refused or being made absolute by the Court. All other proceedings by way of error, or by way of appeal in the proper sense of the term, are taken up and dealt with by Parliament, Parliament thinking it right in the first place as a matter of policy to extend those provisions to revenue suits, and Parliament also evidently showing that it was of opinion that that could not be done without Parliamentary authority.

Lord Chief Justice Cockburn.—Up to this point we have been dealing with error, properly so called.

Sir Hugh Cairns.—Yes, my Lord, up to this point we have been dealing with error properly so called, and the addition of special cases.

Lord Chief Justice Cockburn.—But then error as meant by the Common Law Procedure Acts would be applicable to a special case.

Sir Hugh Cairns.—Yes, my Lord; and when it treats of error upon a special case, it is made analogous to error upon a special verdict.

Now, my Lords, there remains one more section to be referred to, the 26th: "It shall be lawful for the Lord Chief Baron and "two or more Barons of the Court of Exchequer" (there would therefore be a bare majority of the Court) "from time to time to "make all such rules and orders as to the process, practice, and "mode of pleading on the Revenue side of the Court, and as to "the allowance of costs, and for the effectual execution of this "Act, and the intention and objects thereof as may seem to them "necessary and proper; and also from time to time by any such "rule or order to extend, apply, or adapt any of the provisions "of the Common Law Procedure Act, 1852, and the Common "Law Procedure Act, 1854, and any of the rules of pleading "and practice on the Plea side of the said Court to the Revenue "side of the said Court, as may seem to them expedient for "making the process, practice, and mode of pleading on the "Revenue side of the said Court as nearly as may be uniform "with the process, practice, and mode of pleading on the Plea "side of such Court." Now, my Lords, let me examine that section a little. It is divided into two parts, and I will take the liberty of referring to the first part again. The first part gives power to the Barons, or any three "to make all such rules and "orders as to the process, practice, and mode of pleading on the "Revenue side of the Court, and as to the allowance of costs "and for the effectual execution of this Act, and the intention "and objects thereof as may seem to them necessary and proper," power to the Judges of the Court to make rules and regulations for regulating the process, practice, and mode of pleading of one half of the Court. Suppose it had been the whole of the Court, it would make it perhaps more simple, power to the Court or three of the Judges to make rules and regulations for the practice, procedure, and mode of pleading of the Court. The part cannot be greater than the whole, what is the meaning of that? It scarcely

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requires observation; they may regulate in any way they think fit their internal arrangements within the four corners of the Court, they are absolute as to the process, practice, and mode of pleading. They cannot create new Courts,—they cannot go outside their own Court and give to suitors rights external to their Court,—they cannot say: We ordain that the Privy Council, the House of Lords, and the Court of Exchequer Chamber shall hear appeals from our Court, and that suitors shall have the right to go to those other tribunals, and require them to hear appeals. They cannot say: Those other tribunals shall do this thing or that thing, award costs, or not award costs. Their jurisdiction is, if I may use the expression, territorial, they are absolute masters at home, but they are not masters at all from home. When they have performed the duty which is assigned to them as Barons of the Exchequer in their own Court, in hearing and disposing of a case, they are *functi officio;* as to that case it has escaped from them, and there is an end to their control over it, or over all the cases in the Court in a similar position. Although it does not advance the argument, perhaps, except by way of illustration, if the County Courts of this country had not provided for them by Parliament any appeal,—I do not know whether that is so or not, but supposing it was not,—can it be said, then, that under a power of the Judges of the County Court or any twelve of them to make rules for the practice, process, and pleading in the County Court, the Court might say: We ordain that all decisions from of the County Court there shall be an appeal to the Queen's Bench, and from the Queen's Bench to the House of Lords. My Lords, it is absurd. Then these additional words, do they make a difference, "for the effectual execution "of this Act, and the intention and objects thereof?" Clearly not. Then there is a matter upon which, apparently, looking at the outside of the Court, they may make a rule, because the Act of Parliament has provided for error, it has contemplated bail in error. Proceedings in error to that extent, to the extent of regulating the mode of giving bail and arrangements of the same kind, are handed over by parliamentary powers to the Barons of the Exchequer, for the purpose of making rules, not as to who shall have error or who shall not, or where error shall be heard, but for the purpose of giving effect to the intention and objects of the Act, such intention and objects being where it says that error shall be a stay of proceedings upon bail given as the Barons of the Court of Exchequer shall order.

Now, let me take the second part of the clause, "and also from "time to time by any such rule or order," which means a rule or order made by the majority of the Court, "extend, apply, or adapt "any of the provisions of the Common Law Procedure Act, "1852, and the Common Law Procedure Act, 1854, and any "of the rules and practice on the Plea side of the said Court "to the Revenue side of the said Court." Let me stop there. It becomes clearer as we go on, but let me stop there. What are they to do there? "To extend, apply, and adapt," but to what? To extend—to what? To apply—to what? To adapt—to

what? Why, to the Revenue side of their own Court. Supposing it had been again to the whole Court; again I say the part cannot be greater than the whole. Suppose it had said, to extend, apply, or adapt any of the provisions of the Common Law Procedure Acts, and any of the rules of pleading in some other Court to the Court of Exchequer, and assuming that the Court of Exchequer had not been mentioned in the Common Law Procedure Acts, and power granted to the Court of Exchequer to extend, to apply, to adapt any of the provisions of the Common Law Procedure Acts to the Court of Exchequer. What can that mean? Something which, when extended, applied, and adapted, will become process, pleading, practice of the Court of Exchequer, not something which, when attempted to be extended, applied, or adapted, will be process, pleading, or practice of the House of Lords or of the Court of Exchequer Chamber; but the following words remove, if I do not deceive myself, the possibility of argument. "As may seem to them expedient for making the "process, practice, and mode of pleading on the Revenue side of "the said Court, as nearly as may be uniform with the process, "practice, and mode of pleading on the Plea side of such Court." Has there been any doubt as to the way in which hitherto that power should be exercised? Your Lordships, if you have before you the rules which have been made from time to time by the Court of Exchequer, and the learned Judges thereof, under this section, prior to the 4th of November 1863, will see the best possible illustrations of what the section means. Your Lordship will see that in those earlier rules, made upon two or three different occasions, every step and stage of a suit in the Court of Exchequer is taken up, the writs, the processes, the summonses, the declarations, the pleas, the times as to declaring, the times as to pleading, the trials, the process for the jury, the form of the verdicts and the judgments, the consequences of the verdicts as ripening into judgments,—all of those are dealt with, with the most extreme propriety, and the most extreme attention to the power and jurisdiction which is given to the Court, until we come to the 4th of November 1863, and then, contrary to anything that was done before, beyond any thing that was dreamt of before, a wholly different thing is entered upon, legislation is taken up by the Court, and those provisions are laid down under the guise of rules under this clause, which I say are provisions which, it may be found, might be introduced into an Act of Parliament, but which cannot, as I submit to your Lordships, find their justification in any authority short of an Act of Parliament.

Let me for a moment, and that will nearly end all I have to submit to your Lordships, again refer to the rules. Is it practice, or pleading, or mode of proceeding of the Court of Exchequer to say that a suitor in the Court of Exchequer against whom a decision has been pronounced, against whom judgment has been entered up, or is about to be entered up, unless stayed for the purpose of this provision, shall have an appeal to another Court? Is that pleading, or practice, or procedure of the Court

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of Exchequer? I submit with confidence, my Lords, that it is not; it is a new right which may be very proper to be given to a suitor—of that I am no judge,—but it is not any part of the process, practice, and mode of pleading; it is, I say, a new right of appeal to a disappointed suitor, against whom all has been done that the Court before whom he is brought can do, to say to him, "Yes, we have decided against you, but you shall have an "appeal to another Court, and we shall say what that other Court "shall be."

Lord Chief Justice Cockburn.—It would be more striking with regard to the other suitor, who is entitled to the fruits which the execution of the judgment would give him, and from whom you take them away.

Sir Hugh Cairns.—Perhaps it may be that I am rather unwilling to speak of myself, my Lords, but I am in that position, I have the verdict of the Jury. I have the order of Court discharging the attempt made to interfere with that verdict before the Court of Exchequer. I have naught to do with the Court of Exchequer, but to ask for the performance of the ministerial act of entering up judgment, which I know not to be stayed at this moment by anything which can properly stay it. I am in that position, and I am told here, or brought here to be told before your Lordships, that that Court before whom I was lately brought, under a power to regulate their own practice, pleading, and process, have ordered me to be summoned before your Lordships to show cause why the judgment of the Court of Exchequer should not be reversed, and why judgment now should not pass against me. Again, of course, if that be so, I may have your Lordships' judgment upon the case, if it were argued before you, and again I should be told, before the House of Lords, that I am to be summoned there, and incur further delay and expense under the authority of an inferior Court, authorized to regulate its own practice, process, and pleading, who have pronounced in my favour, and who have authorized me to be taken to the House of Lords, in order to have that judgment reversed. Let me read again such words as these—"When the appeal is from the refusal "of the Court below to grant a rule to show cause, and the "Court of Appeal grant such rule, such rule shall be argued "and disposed of in the Court of Appeal:" and so it continues, "the Court of Appeal shall give such judgment." Is that practice, pleading, or process of the Court of Exchequer? "The "Court of Appeal shall have power to adjudge payment of costs, "and to order restitution." I repeat the question there. "Upon "an award of a trial *de novo* by the Court or by the Court of "Error upon matter appearing upon record error may at once "be brought." So that by that rule that Court could have error upon your Lordships' judgment, if your Lordships could find your way to give judgment. The Court of Exchequer, under the authority to regulate their own practice, pleading, and process, have ordered that they shall have a right to bring error upon your Lordships' judgment.

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My Lords, I think that the case need not be pursued further. Unless I can hear from my learned friends, or am told by your Lordships, that there is an answer to this observation, I say it is a misconception to suppose that there was in this case any appeal, and I ask your Lordships to strike the case out of your Lordships' paper.

The Attorney General.

Mr. Attorney General.—My Lords, I do not think that there will be any difficulty in answering my learned friend's argument. If Parliament has given the Court of Exchequer power to make those rules, then there is nothing whatever extraordinary in the rules which Parliament has authorized that Court to make. Now the section in the Act of Parliament is the 26th, which has been mentioned, and my learned friend rightly observed that there were two branches of that section. The first branch authorizes three Barons of the Exchequer to make "rules and "orders as to the process, practice, and mode of pleading on the "Revenue side of the Court as to the allowance of costs, and "for the effectual execution of this Act, and the intention and "objects thereof, as may seem to them necessary and proper." But it does not stop there. The second branch gives a new and quite a different power, plainly sufficient, as we submit, to extend to the matter which is now before your Lordships, "and "also from time to time by any such rule or order to extend, apply, "or adapt any of the provisions of the Common Law Procedure "Act, 1852, and the Common Law Procedure Act, 1854," (I omit the words which follow,) "to the Revenue side of the said "Court." Now, my learned friend said, that, even stopping there he thought he could make good his argument; but then he thought that the words which follow added force to the argument which he offered. My Lords, I also think that if I stop there I can make good my argument, and that the words which follow add force to the argument which I offer.

Now, first of all, my Lords, what is it that Parliament authorizes to be done? It authorizes the Court not to legislate by way of giving jurisdiction to Courts of Appeal, or creating Courts of Appeal, or anything of that sort, but to extend, apply, or adapt any of the provisions contained in certain Acts which Parliament has already passed, and which are there mentioned, to the Revenue side of the Court; and the sole question is, whether that which has been done is or is not an extension or application of certain provisions of those Acts to the Revenue side of the Court of Exchequer? If it be that, then it is clearly within the powers granted by Parliament, and it is really an idle thing to read out the rules, which are simply a transcript of the clauses in the Acts of Parliament referred to, and to say that those rules contain matters which, without the authority of Parliament, the Court of Exchequer could not itself have introduced. Granted that Parliament has given authority to the Court of Exchequer, in the exercise of its discretion, to extend or apply any of the provisions of those two Acts of Parliament to the Revenue side of the said

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Court, if, as I say, this is an extension and application of some of those provisions to the Revenue side of that Court, then there can be no question whatever that they are provisions in those Acts of Parliament, and that Parliament has given authority to the Court of Exchequer to say whether they shall apply or not. Well now, my learned friend's argument, my Lords, independently of the observations which he has made upon some particular clauses in this Act, to which I will refer, entirely depends upon the assumption that within the meaning of this Act of Parliament procedure in error from the Court of Exchequer is no part of the process, practice, and pleading of the Revenue side of that Court. I say that both upon the language of this Act of Parliament, and of the Acts of Parliament referred to, procedure in error is and must be intended to be within the meaning of those words.

First of all, my Lords, let us look at the Acts of Parliament referred to. This formula of expression, "process, pleading, "and practice," is the formula used by Parliament to introduce the entire enactments of the first Common Law Procedure Act of 1852. My Lords, that Act runs thus: "An Act to amend "the process, practice, and mode of pleading in the Su- "perior Courts of Common Law at Westminster," and so on. The preamble is, "Whereas the process, practice, and mode of "pleading in the Superior Courts of Common Law at West- "minster may be rendered more simple and speedy; be it "enacted," and so forth. Now, I beg your Lordships to observe that the whole of the clauses in that enactment are declared by that recital to be clauses enacted for the purpose of rendering more simple and speedy the process, practice, and mode of pleading in the Superior Courts of Common Law at Westminster,—an expression which I will presently show is intended to comprehend all proceedings in error, though those proceedings in error may be carried and taken even to the House of Lords, which undoubtedly is not itself a Superior Court of Common Law at Westminster. It is very material to turn to the clauses relative to proceedings in error, which are all in the first Act of Parliament; and the more so, because, to my great astonishment, my learned friend Sir Hugh Cairns confidently said, that down to the time when the rules were made, of which he now challenges the validity, the Court of Exchequer had always acted, in the exercise of the power given by this 26th clause of the Queen's Remembrancer's Act, within the limits to which he says their power is confined. But I will show your Lordships that the Court of Exchequer has now merely done a second time what it did before in the original set of rules, to which my learned friend himself has referred. It has only extended the same principle to other matters.

Now, my Lords, the clauses as to error to which I particularly direct your Lordship's attention are from the 154th to the 166th sections inclusive of the Common Law Procedure Act of 1852; and your Lordships will observe that under that designation of "the

" process, practice, and mode of pleading in the Superior Courts " of Common Law at Westminster," all the subject matter of those clauses, to which I am now about to refer, is included. Those clauses are not the first upon the subject of error; the earliest clause upon the subject of error will, I think, be found to be the 146th. I take it up, for reasons which your Lordships will very soon discover, at the 154th clause. Now, the 154th, in the first place, speaks of a certain memorandum alleging error which is to be entered, and the form in which that is to be done. Then the 155th section goes on to say that, " Upon such sugges- " tion of error alleged and denied being entered, the cause may " be set down for argument in the Court of Error in the manner " heretofore used, and the Judgment Roll shall without any writ " or return be brought by the Master into the Court of Exchequer " Chamber, before the Justices or two Justices and Barons, as the " case may be, of the other two Superior Courts of Common Law, " on the day of its sitting, at such time as the Judges shall appoint, " either in term or in vacation; or if the proceedings in error be " before the High Court of Parliament, then before the High " Court of Parliament before or at the time of its sitting; and the " Court of Error shall and may thereupon review the proceedings, " and give judgment, as they shall be advised thereon; and such " proceedings and judgment, as altered or affirmed, shall be " entered on the original record; and such further proceedings " as may be necessary thereon shall be awarded by the Court in " which the original judgment was given." Your Lordships will permit me, in observing upon that clause, just to remind you of that which, no doubt, you are not at all likely for a moment to forget; namely, that the record which passes through the Courts of Error is the record of the Court from which the error is brought. It is the record of the Court of Exchequer, which goes up to the Court of Error; and when the error is corrected, the record is returned into the Court of Exchequer, and the Court of Exchequer will enter up the judgment which has been awarded as that which is proper to be given. This 155th clause of the first Common Law Procedure Act deals with the case when it passes into the Court of Error from the Court from which the error is brought. It says how the record is to be brought into the Court of Error, by what formal proceedings, what is to be done with it there, whether the Court of Error be the Exchequer Chamber or the High Court of Parliament, and what that Court is to do upon the error, and what is to be the result of its proceeding.

Then the 156th clause goes on to say, " Courts of Error shall " have power " (again dealing with the power of Courts of Error) " to quash the proceedings in error in all cases in which error " does not lie, or where they are taken against good faith, or in " any case in which proceedings in error might heretofore have " been quashed by such Courts; and such Courts shall in all " respects have such jurisdiction over the proceedings as over the " proceedings in error commenced by Writ of Error."

Then the 157th clause says, " Courts of Error shall in all cases

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The Attorney General.

" have power to give such judgment and award such process as " the Court from which error is brought ought to have done, " without regard to the party alleging error." The 158th relates to a memorandum, which is a matter of form. By the 159th, the plaintiff may discontinue his proceedings in error. The 160th, 161st, and 162nd, and those which follow, relate to what is to take place upon death. I need not dwell upon those. But I beg your Lordships' particular attention to those three which I have read, the 155th, 156th, and 157th sections, which relate to the manner in which the case is to be brought into the Court of Error, whether the Exchequer Chamber or Parliament, and there to be dealt with in error, and to the manner in which the Court of Error is to give its judgment, and the effect of that judgment when given, and the power which the Court of Error is to exercise. All that is part of the code of procedure introduced by this Act for the purpose, as recited in the preamble, of amending the process, practice, and mode of pleading in the Superior Courts of Common Law at Westminster. And it is quite plain, therefore, that within the meaning of that Act a procedure before the Court of Error, even in Parliament, when the record is brought from one of the Superior Courts of Law at Westminster into the High Court of Parliament, is regarded, within the meaning of those Acts, as part of the process, practice, and pleading of the Superior Courts,—and for a very plain reason.

Lord Chief Justice Erle.—Will you forgive me for saying that a writ of error was heretofore a new action in law. Section 148 bears on this: " A writ of error shall not be necessary or used in " any cause, and the proceeding to error shall be a step in the " cause."

Mr. Attorney General.—I am very much obliged to your Lordship. I had not intended to overlook that clause; and it is very important that its effect should be properly considered. These words, " the proceeding to error shall be a step in the cause, and " shall be taken in manner hereafter mentioned," appear to me to be a clue to the whole matter, and confirm what I stated,—that it is regarded as being, in a certain sense, still a proceeding in the Court and in the cause, although, for the purpose of correcting the error of the Court in the cause, the record of that Court is brought up before a superior tribunal, and there the error is corrected, and the record is returned with the correction; but it is still a cause, such as it was before,—a cause on the Revenue side of the Court of Exchequer, a cause on the Plea side of the Court of Exchequer, a cause in the Queen's Bench, or a cause in the Common Pleas. It is still a matter belonging to the Courts of Common Law, and it is not because the subject gets justice done by the correction of their errors that therefore it ceases to be of that nature within the meaning of the Act. A proceeding in error is a step in that cause, and that reconciles the whole with the preamble, and shows that the Legislature did not stultify itself when in the Act it spoke of amending the process, practice, and

pleadings in the Superior Courts of Common Law at Westminster, and then went on to say how the proceedings in those Courts which contained errors requiring correction were to receive that correction, namely, by passing through the Courts of Error in the ordinary form; and the record, after the error is corrected, comes back to where it was originally. It was always, from first to last, a record depending in the Court of Exchequer, on the Revenue side of the Court of Exchequer, and this is only a particular manner which Parliament has pointed out of making it a right record. That is all.

Well now, my Lords, I beg attention to the Queen's Remembrancer's Act. My learned friend travelled through various clauses of that Act, which take away all discretion from the Court of Exchequer, which leave no discretion to the Court of Exchequer, which decide *ab origine* by Parliamentary authority what particular things shall be binding on the Court of Exchequer without discretion; but these do not in any degree cut down the effect of that discretion which is afterwards left to the Court of Exchequer; —and I was very much struck, as my learned friend read through those clauses, that he failed to see how fatal to his argument the language of one of those clauses, the 19th, was. I now ask your Lordships' attention to that clause. It exactly agrees with what we just now saw in the first Common Law Procedure Act. It says that "a writ of error shall not be necessary or used in "any suit or proceeding in error on the Revenue side of the "Court of Exchequer, and the proceeding to error shall be a "step in the cause, and shall be taken in manner, and subject as "to such terms and conditions as to giving bail or security, as may "be directed by any rule or order made by the Barons under this "or any other Act or Acts of Parliament authorizing the same, "provided that nothing herein contained shall invalidate any pro-"ceedings already taken or to be taken by reason of any writ of "error issued before the commencement of this Act, or before "such rules and orders come into effect." Now, I ask your Lordships' attention to two things with regard to that clause. It surprised me very much to hear my learned friend read that clause, and say that that clause is an application of the 148th section of the Common Law Procedure Act of 1852. It is an independent and substantive enactment. It makes no reference whatever to the Common Law Procedure Act of 1852; and, but for the orders afterwards made under the authority now disputed, the authority of the 26th section, by the Court of Exchequer, the clauses which I have read to your Lordships as to error from the Common Law Procedure Act of 1852 would not be applicable to a proceeding in error under that 19th section. I ask your Lordships' attention to that again—that the section distinctly recognises the proceeding in error on the Revenue side as being a step in the cause; and therefore, when you afterwards find in the 26th section words saying that the provisions of the Common Law Procedure Act may be extended by the Court to the Revenue side of the Court, you know, of course, that that means to all proceedings in

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a cause depending upon the Revenue side of the Court; and a proceeding in error is expressly declared by the 19th section to be one of those. What has been done by the Court of Exchequer upon that?

Lord Chief Justice Cockburn.—This is not a proceeding in error that we are dealing with now, it is a proceeding by way of appeal.

Mr. Attorney General.—That is perfectly true, my Lord.

Lord Chief Justice Cockburn.—The 19th section does not apply at all to the proceeding before us now.

Mr. Attorney General.—No, my Lord, it has no direct application, but I think it will be found to have a most material influence, and to assist us in seeing the construction to be placed upon the power which we find in the 26th section;—because, with respect to this other clause as to proceedings in error, concerning which these words are expressly used, we shall find that the Court is left to apply the Common Law Procedure Act and its provisions, and to apply provisions as to error completely analogous to those as to the proceeding by way of appeal now before your Lordships, which were not in themselves applied by the Queen's Remembrancer's Act. And that is what I wish your Lordships to see. The Queen's Remembrancer's Act did deal, to the extent which your Lordship has seen, particularly with some kinds of appeal, and with errors properly so called; but it did not deal with errors by at once introducing all the provisions relative to errors in the Common Law Procedure Act, 1852, or any of those provisions, except so far as power to introduce them may have been communicated by the 26th section to the Court of Exchequer. Well, now, the Court of Exchequer have considered that the power was communicated to them; and I beg your Lordships to observe upon this subject, first, what the Court of Exchequer have done by the earlier orders. Your Lordships will recollect that my learned friend referred to the orders made by the Court of Exchequer upon the 22nd of June 1860, and those rules are headed thus:—"Court "of Exchequer, Revenue side. In pursuance of the provisions "contained in the 26th section of the 22nd and 23rd Victoria, "chapter 1, intituled 'An Act to regulate the office of Queen's "'Remembrancer, and to amend the practice and procedure on "'the Revenue side of the Court of Exchequer,' it is ordered "that the following rules with respect to the matters herein-after "mentioned shall be enforced on the Revenue side of the "Court of Exchequer." Then follow a number of things, which were described generally with sufficient accuracy by my learned friend. But at page 13 of the copy which I hold in my hand, we come to that part of the rules which is headed "Proceedings in Error."* The 97th rule states what is to be done in the shape of delivering a certain memorandum to the Queen's Remembrancer; the 98th deals with the subject of the stay of execution, and the security to be given. The

* *Vide* Appendix, page iii.

99th deals with the matter of pleading in error, "the assignment "of and joinder in error in law shall not be necessary," and so on. The 100th deals with the way in which the roll is to be made up. And then, my Lords, we come to the 101st, and, omitting the intervening one, the 103rd. By the 101st, the Court of Exchequer ruled this: "The several provisions contained in the 154th, "155th, 156th, and 157th sections of the Common Law Procedure "Act, 1852, where applicable, shall extend and be applied in "like cases on the Revenue side of the Court." The 103rd also extends sections 159 to 166. Now, it is for that reason that I read to your Lordships at length the 155th, 156th, and 157th sections of the Common Law Procedure Act of 1852, which, as your Lordships will recollect, relate to the mode in which error is to pass through the Court of Exchequer Chamber and the House of Lords, what is to be done in those Courts, and what is to be the consequence of what they do.

Parliament, in the Queen's Remembrancer's Act, was content to say simply in the 19th clause, and in some others, that a proceeding in error shall be a step in the cause, and that error would lie in certain cases, but there is not a word in the Queen's Remembrancer's Act which says that those clauses of the Common Law Procedure Act, 155, 156, and 157, which relate to the mode in which error is to pass through the Courts of Error shall be applied. And therefore it would be entirely a *casus omissus*, if it were not within the power granted to the Court of Exchequer in the 26th section. But if it be within that power, there is an end of all that, at first sight, very plausible and specious argument of my learned friends, that the Court of Exchequer, under a power enabling them to adapt rules for the general purposes connected with their own Court, have taken upon themselves to say what the Court of Exchequer Chamber shall do, and what the House of Lords shall do. They have taken that upon themselves, just as much by those rules of the 22nd of June 1860, by the 101st section of those rules, applicable to proceedings in error, as they can be said to do now; because although it is true error is one thing and appeal is another thing, yet they have no more power to say what the House of Lords and the Court of Exchequer Chamber shall do in error, than to say what the House of Lords and the Court of Exchequer Chamber shall do in appeal. If they have any power at all, it is simply a power to declare what provisions of the Common Law Procedure Act shall be applicable to the Revenue side of the Court of Exchequer. Under that power they have declared that the sections 155, 156, and 157, in the Common Law Procedure Act, 1852, which relate entirely to what is to be done by the Court of Error, shall be applicable; and if it should be held by your Lordships that that was *ultra vires*, of course we must submit to that decision; but the result is this, that Parliament will have introduced some particular provisions into this Queen's Remembrancer's Act as to error, but will not have said how those errors are to be prosecuted. And I presume, therefore, that it would follow that they must be prosecuted

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in the old way, and that all those enactments, obviously meant to be generally applicable where error is to be brought, contained in the Common Law Procedure Act, not being introduced *per se* in this Act, not being introduced *per expressum* in the Queen's Remembrancer's Act, and, *ex hypothesi*, not being within the power of introduction given in the 26th section, therefore, it must fall through, and the old process of error must apply in every such case. Really, I think that your Lordships will find with that aid no difficulty at all in coming to a sound conclusion as to the meaning of the 26th section, and saying that nothing has been done which exceeds the power given by that section.

But before I come to that point I will just remind your Lordships that the clauses which are applied are simply transcribed into the rules out of the Common Law Procedure Act of 1854; they are the clauses from 34 to 42 inclusive, I think, of the Common Law Procedure Act of 1854. What has been done is not making any enactments, but simply adapting, applying, and extending to the Revenue side of the Court of Exchequer, (if I am right in the interpretation that I place on these words), those particular provisions of that Act of Parliament. That is what has been done. Parliament is the enacting authority. Parliament originally enacted the provisions, and Parliament said that it shall be competent for the Court of Exchequer to extend them to the Revenue side of the Court. That is what Parliament has said; and it is an error and a fallacy to say that the Court of Exchequer took upon themselves to legislate. The Court of Exchequer interprets the power which Parliament has given to it to extend *quoad hoc*, to enable it to say that henceforth those provisions of the Common Law Procedure Act are to be applicable to causes upon the Revenue side of the Court of Exchequer. I will examine presently whether there is any obstacle to that being done, but at all events, the nature of the thing is to be understood that those particular clauses which relate to the subject are merely transcripts from the Common Law Procedure Act of 1854.

Let me for a moment, my Lords, dwell upon one of those clauses, which I may call the governing and leading one of them, in order that your Lordships may see how impossible it is to separate those matters from the procedure of the Court of Exchequer itself. The 35th section is the section to which I particularly refer, which is, in truth, the governing section, under which the whole matter arises. "In all cases of "motions for a new trial upon the ground that the Judge has "not ruled according to law, if the rule to show cause be refused, "or if granted be then discharged or made absolute, the party "decided against may appeal, provided any one of the Judges "dissent from the rule being refused, or, when granted, being "discharged or made absolute, as the case may be, or provided "the Court in its discretion think fit that an appeal should be "allowed," with a proviso that there is to be no appeal upon matters of discretion, as where the verdict is against evidence. Every single condition there mentioned is a condition to be

fulfilled in the Court of Exchequer; it is in the Court of Exchequer that the motion is made, on the ground that the Judge has not ruled according to law. It is in the Court of Exchequer that the rule to show cause is refused, or granted, or discharged, or made absolute; it is in the Court of Exchequer that the Judges dissent, whose dissent must have given rise to the appeal, and a discretion is exercised by that Court as to whether the Court think fit that an appeal shall be allowed. Down to that point at all events, beyond the possibility of dispute, everything that constitutes the *locus standi* of the appellant arises out of that which is matter of process and practice in the Court of Exchequer in the moat exact and literal sense of those words.

Now, my Lords, bearing that in mind, let us come to this clause, afterwards examining the Act to see whether there is anything else in the Act to lead us to a different conclusion. Let us see, looking at the general scope of those Acts of Parliament which are referred to, and especially to the preamble of the Common Law Procedure Act, 1852, and the way in which it uses the words "process, practice, and pleading," looking at the nature of the enactments concerning error which are to be found in the first, and looking at the nature of the enactment concern- appeal, which is to be found in the second of those Acts, being that section which I just now read, let us see whether it is not a rational and right interpretation of this 26th section to hold that it enables the Court of Exchequer, if it thinks fit, to apply, to all intents and purposes, to causes upon the Revenue side of that Court, any of the provisions of these Common Law Procedure Acts.

I omit the first branch of the 26th section about rules and orders, which touches a different question. "It shall be lawful for the "Chief Baron and two or more Barons from time to time by any "such rule or order," that is, any rule or order made in a certain way which we do not dispute about, "to extend, apply, or adapt "any of the provisions of the Common Law Procedure Acts, "1852 and 1854." Why not these provisions? That is the first question.

Lord Chief Justice Cockburn.—What strikes me most forcibly and presents to my mind the most serious difficulty in the matter is this, if it was intended to give an appeal, as the Legislature clearly did give an appeal in all civil cases, from one of those three Courts to the Court of Exchequer Chamber, why should not the Legislature have expressly said so? and why should it have left it to that inferior tribunal to determine whether or not there should be an appeal from it to the Court of Exchequer Chamber?

Mr. Attorney General.—I humbly submit that upon that and many other points the Legislature thought fit to leave a discretion to the Court of Exchequer to determine whether there were good reasons for or against extending any of the provisions of the Common Law Procedure Act to the cases on the Revenue side of the Court.

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Lord Chief Justice Cockburn.—On mere ordinary questions within the ambit of the Court itself, with regard to its practice and its proceedings, it might be difficult to know in all cases whether the rules which the Common Law Procedure Act had prescribed were applicable to a particular case; but when you come to the grave question of whether there should be an appeal, that is so much of the essence of legislation itself that, as the Legislature determined that there should be an appeal in all cases of civil proceedings, we may suppose that either it would have said when dealing with revenue proceedings, there shall be such an appeal, or that it would have left that unsaid, but we should not expect that it would have left it to an inferior Court to determine whether there should be an appeal or not.

Mr. Attorney General.—I cannot but submit that that is a very inconclusive view of the matter, when your Lordships remember that the procedure which the Court shall "adapt, apply, "or extend," was merely a procedure enabling a matter of law to be brought on by way of appeal in a different mode from that in which it could have been brought before.

Lord Chief Justice Cockburn.—Under the Common Law Procedure Act a bill of exceptions was provided for.

Mr. Attorney General.—But this Act says by the 26th section, under the heading, "Bill of Exceptions," "Either party may tender "a bill of exceptions on the trial of any issue arising on the revenue "side of the Court, and the like proceedings may be had and "taken thereon, as in such cases between a subject and subject." So that the right to raise questions of law by a bill of exceptions was given. And here I cannot resist the opportunity of observing that we are only before your Lordships now, because the Court of Exchequer has put us into this position. We tendered a bill of exceptions——

Lord Chief Justice Erle.—I think it is unnecessary to go into that subject particularly. I was about to remark that I think proceedings by way of appeal here might have been considered by the Legislature the more convenient way of exercising the right that was really given to the parties by the bill of exceptions. That had been found to be a very cumbrous and expensive and dilatory method, and the proceeding by way of appeal was substituted for it.

Mr. Attorney General.—Your Lordships will see the way in which I wished to put this matter. If we had not had the right of coming by way of appeal to this Court upon a bill of exceptions, then it might have been said that it was a matter of substance and not of form,—that it was not a mere question of the mode of procedure, whether we should come in the manner in which the Common Law Procedure Act, in the 35th section, had said that other people might come. But it becomes a different question the moment the Legislature has said that we shall have the ordinary right of coming by a bill of exceptions. Then, inasmuch as the Common Law Procedure Act only gives a different form of appeal by the 35th section upon matters of law, that is

to say, upon the same questions which we should have a right to raise by a bill of exceptions, the Common Law Procedure Act having considered that the other form, that is, the power of appealing upon a motion for a new trial upon matters of law, would in many cases be a more convenient mode of arriving at the same result, and asserting the same right as by the bill of exceptions; it comes to a mere question of procedure. It is not that parties who had no right of appeal have a right of appeal now given to them; but that parties, who had a right of appeal under one form by the Act, have not expressly under the Act a right of appeal under another form; respecting which the Legislature has given the Court the right to judge whether there are or are not sufficient reasons of convenience, having regard to the peculiar nature of revenue questions, to induce it to apply those provisions of the Common Law Procedure Act, which are not distinctly applied to revenue cases.

My Lords, the way in which I venture to put the matter is just this. The Legislature considered that in these revenue cases the subject or the Crown had a right to appeal upon matters of law. It gave that right expressly and distinctly and unequivocally, by a bill of exceptions, in the 20th section. It did not think it necessary to determine upon the face of this Act, whether or no the alternative mode introduced in civil proceedings by the Common Law Procedure Act is a more convenient mode of procedure, or whether it should be introduced in revenue causes; because there were peculiarities in the nature of revenue causes which it was thought might make it expedient to leave a very large discretion to the Court of Exchequer to determine what part of the new provisions introduced by the Common Law Procedure Acts should be applied to those causes. But if this portion of those new provisions was applied, that would not be giving a right of appeal which was not existing before; it would be merely applying, for the same purpose, other means as being more convenient means of raising the same question of law which might have been raised by way of a writ of error.

With respect to the 19th clause, which says that there shall be a certain change as to proceedings in error, without introducing the clauses of the Common Law Procedure Act, 155, 156, or 157, which regulate the mode in which the Court of Exchequer Chamber and the House of Lords are to act in error, the argument which I offer is, that this shows the Legislature was content there to affirm the principle and lay down the rule; but as to the mode of procedure, though it might be extremely important, it was content to leave the Court of Exchequer to judge how far that mode of procedure which regulated civil cases could be conveniently applied upon the Revenue side. When you have the right to go by a bill of exceptions, it is merely a change of procedure to grant the appeal, the benefit of which we are now claiming. I must repeat what I said just now, that in this particular case the very grossest injustice will be done if we are left remediless. I do not impute anything to my learned friends.

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The Attorney General.

They will understand me as saying that they have the most perfect right to take the course they are taking. There was no bargain between them and us. They could not be bound by what took place in Court when they were not present, and nothing can be more fair and more above board than the course they are taking.

Sir Hugh Cairns.—"Gross injustice;" what is the meaning of that?

Mr. Attorney General.—I say gross injustice, because we had the right of appeal under a bill of exceptions. We tendered one, and the learned Judge said that nothing would induce him to sign it.

Sir Hugh Cairns.—I must ask my learned friend to explain the words "gross injustice."

Mr. Attorney General.—I have explained them.

Sir Hugh Cairns.—You say you do not charge me; but we complain of a rule being made behind our back to suit a particular case.

Lord Chief Justice Cockburn.—Really this is entirely beside the question of our jurisdiction, which is the only one before us now.

Mr. Attorney General.—I quite agree in that, my Lord.

Lord Chief Justice Cockburn.—Whatever might be the hardship in this particular case, we must determine the matter before us as a question of law.

Mr. Attorney General.—No doubt, my Lord. All I meant was this: we were desirous of taking our remedy in the precise mode pointed out by the Act. It was suggested that this was the more convenient mode of proceeding. Of course, if it was incompetently taken, we must abide by the result. But we should have lost, upon the ground that the Court considered this mode of proceeding more convenient, and more calculated to do justice under the particular circumstances of such a case,—the benefit of that particular mode of appeal by a bill of exceptions, which was expressly and clearly given to us by the Act of Parliament. I agree that that will not decide the question; but it has a strong bearing by way of illustration upon what I was just now saying, that the one form is really a mode of proceeding, giving the same right as the other form, which may, under many circumstances, be the more convenient form; the right to the other form being expressly given by the Act of Parliament under the 20th section.

And when we come to the interpretation of the 26th section, I say that there is language there amply sufficient to cover the case, and that there is no reason whatever why that language should not receive its full effect. What are its words? "It shall be lawful "for the Lord Chief Baron and two or more Barons of the Court "of Exchequer from time to time to make all such rules and "orders as to the process, practice, and mode of pleading on the "Revenue side of the Court, and as to the allowance of costs, and "for the effectual execution of this Act and the intention and "objects thereof, as may seem to them necessary and proper, and "also from time to time by any such rule or order to extend,

" apply, or adapt any of the provisions of the Common Law " Procedure Act, 1852, and the Common Law Procedure Act, " 1854."—I omit the words which follow,—" to the Revenue side " of the said Court." Then I contend, that the Court have a right to say, These provisions of the Common Law Procedure Act, commencing with the 34th section, those which relate to appeal on motions to enter a verdict of nonsuit or for a new trial, and all that important body of provisions in the Act, commencing with matters which are undoubtedly to be done in the Court itself, and involving a discretion to be exercised by the Court itself, including a good many details of procedure in the Court itself, first and last, and extending also to what is to be done in the Court of Appeal, are, in our judgment, fit to be applied and extended, and we do apply and extend them to the Revenue side of the said Court.

Let me for a moment ask your Lordships this question. If you had found in the Act of Parliament itself these words, " All the " provisions of the Common Law Procedure Act, 1854, shall be " applied to the Revenue side of the Court of Exchequer," would there have been the slightest difficulty in the interpretation of those words? Would it not have been perfectly clear that those clauses were as capable of being applied to the Revenue side of the Court of Exchequer as any others in the Act? What is the meaning of " applying and extending them to the Revenue side?" The meaning is, that cases on the Revenue side of the Court of Exchequer shall be subjected to and regulated by these provisions.

Lord Chief Justice Cockburn.—Suppose there had been an appeal granted to the Court of Exchequer Chamber without any provision as to the procedure during the time that the cause was before that Court of Appeal, I take it that it would have been competent to the Court of Exchequer Chamber, as in other cases where there is no established practice, to lay down rules of its own for its own guidance; the Court of Exchequer would have had the power to do that. Why? Because the cause is no longer in the Court of Exchequer, but before the Court of Appeal.

Mr. Attorney General.—I understand that the Act of Parliament has laid down these rules.

Lord Chief Justice Cockburn.—I merely put that for you to see whether the cause is still in the Court of Exchequer or in the Court of Appeal.

Mr. Attorney General.—I say, my Lord, that, whether the appeal is here, or even in the House of Lords, the cause is still in the Court of Exchequer. It is brought up here in order that the error of the Court of Exchequer may be corrected; but what is brought up here is a record belonging to the Revenue side of the Court of Exchequer.

Lord Chief Justice Cockburn.—Suppose there had been no provision that the Court of Exchequer itself should make rules regulating the practice, could the Court of Exchequer itself have made rules governing the practice when the cause should be elsewhere?

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Mr. Attorney General.—If no power had been given to the Court of Exchequer, it is manifest that it could not have done so. But Parliament has said, in the Common Law Procedure Act, what mode of procedure is to be adopted in the case of appeal, and there is not a word in the rules now in question which goes beyond a mere adoption of these provisions which relate to proceedings in the Court of Appeal. What I was saying is this. The Act says: "It shall be lawful for the Court of Exchequer to extend "and apply any of the provisions of the Common Law Procedure "Act, 1854," which obviously includes all the provisions of that Act, unless there be something repugnant in them to the Revenue side of the Court. Is it not competent to the Court to apply those provisions to the Revenue side of the Court?—*primâ facie* it is competent, if in the nature of things it is possible. Now is it not in the nature of things perfectly possible? I test that by saying, if Parliament had said "All the provisions "of the Common Law Procedure Act, 1854, shall extend and "apply to the Revenue side of the Court of Exchequer," can there be a doubt that those provisions which relate to appeal on motions to enter a verdict of non-suit or for a new trial, although they might be appeals to the Court of Exchequer Chamber or to Parliament, would have been comprehended under those words? If no Court would have been able to say, these particular proceedings are inapplicable to the Revenue side of the Court of Exchequer, therefore the general application of the Act must be taken to be with the exception of these proceedings, because these proceedings in the Court of Error are not proceedings on the Revenue side of the Court of Exchequer,—if such a position would have been entirely untenable upon the construction of an Act of Parliament, saying "All the proceedings of the Common Law Procedure Act, "1854, shall extend and apply to the Revenue side of the "Court of Exchequer," then it is equally untenable upon the construction of the Act of Parliament, which gives to the Court of Exchequer the power from time to time by rule or order to extend or apply any of the provisions of this Common Law Procedure Act to the Revenue side of the Court. The question is merely this: What is the meaning of applying those provisions to the Revenue side of the Court? Is it not applying them to proceedings commencing, to causes depending, on the Revenue side of the Court? The right of appeal attaches before the cause has left the Court, if they are so applied, and all the rest is mere sequence from that.

Now, my Lords, will you allow me to illustrate that argument and press it further by reference to the very words of the 35th section,—I say that beyond all question, and beyond all possible controversy, the 35th section operates upon the cause while it is in every sense still in the hands of the Court of Exchequer. In all cases of motions for a new trial, if certain things be done, "the party decided against may appeal, provided any one of the "Judges dissent from the rule being refused, or when granted

" being discharged, or made absolute, as the case may be, or, " provided the Court in its discretion think fit that an appeal " should be allowed." The three next clauses, 37, 38, and 39, all go on to state certain things which are to be done, still in the Court of Exchequer. Can there be a possible doubt that the operation and incidence of clauses 35, 37, 38, and 39 is upon the cause, while it is still to all intents and purposes in the Court of Exchequer?

If there had been words in the Act of Parliament saying, the Common Law Procedure Act of 1854 shall extend to the Revenue side of the Court of Exchequer, can it be doubted that these clauses would have extended to the Revenue side of the Court of Exchequer? and that those clauses so extending, all the rest that takes place in the Court of Exchequer Chamber and in the House of Lords is a sequence upon that? It is a record of the Court of Exchequer which has come up. The right of appeal has attached to it in that Court. The first procedure has been begun in that Court, and it has gone on in such a way that all the rest is a mere sequence upon that.

Mr. Justice Crompton.—It appears to be rather an assumption to say, that because the Act says that the proceeding in error is " a step in the cause," the cause is in the Court of Exchequer at the time. For many purposes,—that of taxing the costs for instance, and other things belonging to that Court,—it is taken as a step in the cause; but I am not aware of any words that make it a cause in that Court.

Mr. Attorney General.—It is still a record of that Court, and therefore you may say it is in that Court.

Mr. Justice Crompton.—It was in order to do away with the useless trouble of sending transcripts to other Courts that it was made to remain in the same Court for the purpose of taxing costs, and so on. In certain cases it may be doubtful whether it is to be in the one Court or the other. It is made a record in the Court of Exchequer; but I do not find anything in the Act to say that it does not travel out of the Court below and come into the Court above. Therefore I think the expression not quite correct, when you say that it is in the Court of Exchequer.

Mr. Attorney General.—I said that it was a cause belonging to the Revenue side of the Court of Exchequer.

Lord Chief Justice Cockburn.—When it comes to us, this Court, does it not issue out of that Court?

Mr. Attorney General.—It comes to return. I venture to say that it is a record of the Court of Exchequer from first to last. It never ceases to be so, and when the final judgment is passed execution will be by that Court. It comes up from the Court of Exchequer to a Court of Error to be reviewed, and to have the errors corrected, and in that sense no doubt it is in the Court of Error.

Lord Chief Justice Cockburn.—That is now equally so with regard to a bill of exceptions, and yet when a cause comes up upon a bill of exceptions, it is governed by the practice of the Court of Error.

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Mr. Attorney General.—Yes, no doubt; but it is not merely true that it is a proceeding which begins in the Court of Exchequer and ends in the Court of Exchequer; but the record from first to last is a record of the Court of Exchequer, a record of a cause depending upon the Revenue side of the the Court of Exchequer, which record no doubt is removed for a time from the Court of Exchequer, and brought up into the Court of Error, to be there seen, and to have the error corrected. But it does not for an instant of time cease to be a record of the Court of Exchequer from which it came, and into which it has to be returned. Therefore I say that, if the Act of Parliament had said, These clauses shall extend to the Revenue side of the Court of Exchequer, the working out of them would be the easiest thing in the world. In the first place, the 35th clause would attach, and that would tell us that, when the record had at no time left the Court of Exchequer, upon certain conditions to be determined in the Court of Exchequer, the right of appeal would arise. Then two or three subsequent clauses say, what, while it is still in the Court of Exchequer, is to be done, that right having attached. It is while still in the Court of Exchequer an appealable cause; and, being an appealable cause, certain things will determine whether the right has arisen or not, and what is to be done when it does arise, to transmit the cause from the Court of Exchequer to the Court above. Therefore, I beg your Lordships to observe that if the words had been "These clauses "of the Common Law Procedure Act, 1854, shall extend and "apply to the Revenue side of the Court of Exchequer," there would not have been the slightest difficulty in the interpretation of those words. You would at once have applied the 35th and subsequent sections, which show what is to be done in the Court of Exchequer, to the Revenue side of that Court. And the rest is consequent upon that, showing what is to take place when the cause, being appealed from the Court of Exchequer, is transferred to the Court of Exchequer Chamber on its passage through that Court.

What is the effect of the words which end the clause? I must say that to me, it does strongly appear that those words, instead of assisting my learned friend's argument, have the opposite effect. The Legislature authorizes the Court to extend, apply, or adapt any of the provisions of this Act, which, as I say, means "all "or any" to the Revenue side of the Court of Exchequer, "as "may seem to them expedient for making the process, practice, "and mode of pleading," (words which in this Act mean procedure) "on the Revenue side of the Court as nearly as may be "uniform with the process, practice, and mode of pleading on the "Plea side of such Court." Now the Legislature had extended by the Common Law Procedure Act to the Plea side of the Court that procedure which is contained in the clauses which have been referred to, and which, in certain events and upon certain conditions happening in the inferior Courts, give a right of appeal and prescribe the mode in which that appeal shall be pursued instead of a bill of exceptions. The object of the power given

in the 26th section is to enable the Court of Exchequer to assimilate, as far as they think fit to do so, the whole of the proceedings in Revenue causes to the proceedings upon the Plea side.

Lord Chief Justice Erle.—It appears to me that the Court of Exchequer have the discretion to adopt so much of the Common Law Procedure Act of 1854 as they think expedient. As far as I can see, in the Court of Exchequer they have not given to them the right of stating a special case between the parties and going to the Court of Error.

Mr. Attorney General.—I think your Lordship will see that those earlier sections of this Act referred to by my learned friend, Sir Hugh Cairns, deal with matters upon which it was not thought expedient to give any discretion to the Court of Exchequer. It is in the 10th section.

Lord Chief Justice Cockburn.—The 10th section gives it specially; that is what makes such an impression upon my mind. The Common Law Procedure Act gives a right of appeal upon a special case. And then the Act goes on to give an appeal in the case of misdirection and so forth. This Act of Parliament introduces the enactment, of the Common Law Procedure Act with regard to the special case, and I should have expected it to go on and say that there should be an appeal.

Mr. Attorney General.—Let me say this, which applies also to certain other sections which give certain rights of appeal in other cases. The Legislature did not think fit as to those cases to leave any discretion to the Court of Exchequer. The instance referred to is one which depends on the consent of the parties.

Sir Hugh Cairns.—So it does in the Common Law Procedure Act.

Mr. Attorney General.—Yes; but it is merely an appeal in a proceeding which may be taken by consent. Of course there could be no difficulty as to that. It was thought that where the parties were willing that was a convenient proceeding, and it was not thought necessary to give the Court a discretion upon that; nor again upon a bill of exceptions, nor with regard to the mode of bringing error. Those things are expressly dealt with. The Legislature saw its way to that extent, and did not to that extent think it necessary to leave anything whatever to the Court of Exchequer. But, as to everything else which is matter of procedure, the Legislature has said, the Court of Exchequer shall be the judge; there may be difficulties as to some matters which we have not dealt with, and which may require consideration by the Court; and with regard to those matters the Court of Exchequer shall judge whether it is expedient to go further than this Act has already gone towards a complete assimilation of the Revenue side to the Plea side of the Court of Exchequer. That Court is to have the power to determine that, and for that purpose it may extend or apply all or any of the provisions of the Common Law Procedure Act. Therefore, unless those provisions are such as in their nature could not be applied, if that Court had said, One of them

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shall be applied, nobody could have said that it was not so applied by the Act of Parliament.

Lord Chief Justice Cockburn.—The Legislature attaches certain conditions to the right of appeal under clauses 35, 36, 37, 38, 39, 40, 41, and 42. Is it to be said that it is to be at the discretion of the Court of Exchequer to establish an appeal, to say what shall be the Court of Appeal, and to say whether or not it will adopt the provisions of the Legislature in all these sections? Is it to be entirely discretionary in all the subjects and all the adjuncts.

Mr. Attorney General.—All have been adopted.

Lord Chief Justice Cockburn.—Yes, by the discretion of the Court of Exchequer; but can it be supposed that the Legislature meant to leave it to the discretion of that Court?

Mr. Attorney General.—It seems to me that confidence was placed by the Legislature in the Court of Exchequer. When you have a series of connected provisions dependent upon each other, and showing the nature of the course intended to be taken upon a certain appeal, it cannot be supposed that, exercising its power to assimilate the process, practice, and mode of pleading upon the Revenue side to that upon the Plea side, the Court of Exchequer would omit any portion of that series of provisions introduced upon the Plea side to give effect to the appeal. The confidence which the Legislature placed in the Court of Exchequer seems to me a complete answer to a difficulty of that kind. It was not to be apprehended, and the Legislature did not apprehend, that if the Court thought fit to extend the principle of the 35th clause, the Court would not also extend the application of those provisions which the Legislature had laid down as the proper consequences of the application of that section in the cases to which it had itself applied it. I must say that, to my mind, that suggests no difficulty whatever. Certainly it would be a most extraordinary thing that where the Legislature has introduced this not unimportant variation of the form of raising questions of law by way of appeal, where the Legislature has applied that to the whole procedure upon the Plea side of the Court, giving a power to the Court of Exchequer to adapt or extend or apply all or any provisions of these Acts for the purpose, as far as they think it expedient to do so, of making the procedure upon the Revenue side as nearly as may be uniform with the procedure upon the Plea side of the Court, the whole or any material part of those important matters should be excluded, the exclusion of which would make uniformity impossible.

Now, my Lords, my argument comes to this—the whole is expressed by the words "extend or apply any of the provisions of "these Acts to the Revenue side of the Court." Such words occurring in the Act of Parliament itself could have been, without the least difficulty, applied in point of interpretation to the clauses of the Act of 1854, with which we are dealing, the power being general, and the object being the assimilation of the two sides of the Court. Then it surely was not meant so to limit the

powers given to the Court by words not in the clause as to put it out of their power to do something, without which it would be impossible that the two sides of the Court could be thoroughly assimilated together.

My Lords, I have only to add this, that if your Lordships should accede to this objection, we are, I apprehend, entirely remediless. But if, on the other hand, you should overrule it, there is another tribunal, which, if the objection is well founded, would of course be enabled to give effect to it. I do not mean to say that that is any reason why, if you thought the objection to be clearly well founded, you should not give effect to it, no doubt it would be your duty to do so; but if you were not well satisfied upon the matter, I think it would be some satisfaction to your Lordships to know that the parties on the other side would have the same objection open to them in another place.

Now, my Lords, there is one remark which I omitted to make a short time ago, and that is this—It seems to me that my learned friend's argument upon the 26th clause really makes the whole of the latter part of it superfluous. Why and for what purpose is express power given to extend, apply, or adapt any of the provisions of these two Acts of Parliament if that power could not be exercised, as to anything not incident to the Court itself, in the strictest and most proper sense? Because that would be covered by the previous words :—" It shall be lawful for the Lord Chief Baron and " two or more Barons of the Court of Exchequer from time to time " to make all such rules and orders as to the process, practice, and " mode of pleading on the Revenue side of the Court, and as " to the allowance of costs."

Lord Chief Justice Cockburn.—And then, with respect to evidence, it is important to consider whether that would be within the new process, because there are some very important evidence clauses in the Act.

Mr. Attorney General.—I think, my Lord, it may be doubted whether the evidence clauses in the Common Law Procedure Act are comprehended under the title. I am not sure of that.

Lord Chief Justice Cockburn.—There are various provisions relating to practice, and the 33rd section is that in every rule for a new trial the grounds shall be stated, and so forth.

Mr. Attorney General.—Yes, my Lord, that is what we are now upon; that would be clearly within the first power.

Lord Chief Justice Cockburn.—No doubt it would.

Mr. Attorney General.—My observation is this: It seemed to me that my learned friend's argument had a tendency to render superfluous the words " to extend, apply, or adapt any of the " provisions," and in substance to say that that part of the clause cannot be used for any object which would not really be accomplished by the earlier part, taken alone, with respect to making rules and orders. Obviously there is a great difference between saying that the Court shall be able to apply certain provisions of an Act of Parliament, and saying that the Court shall be able to make certain rules and orders operate by the authority of the

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Court. But the provisions of the Act of Parliament, when applied under the authority named by Parliament, operate by the authority of Parliament directly. It is simply that Parliament says, We suspend the application of such and such enactments as to particular subjects until an authority whom we trust shall say that they shall be applied to that subject. But when that authority says it is of opinion that they should be applied, then they do apply by virtue of the Act of Parliament itself; namely, the Act of 1854. Then I say that my learned friend's argument tends to prevent the application of that last power altogether. If I am wrong in that, and if there be matters such as that with respect to evidence to which your Lordship has referred——

Lord Chief Justice Cockburn.—And discovery and inspection? Those are material things.

Mr. Justice Crompton.—Where an appeal is expressly given by the Legislature, the practice as to that appeal is to hand in a memorandum as an easier mode of bringing error and stating cases. When an appeal is given it is given by the actual words of the statute.

Mr. Attorney General.—These matters are very important to be attended to; and in fact seem to me to illustrate the argument which I shall have to put to the Court. If such matters as injunction, discovery, and the like are covered by the clause—if the words "for making the process, practice, and mode of pleading "on the Revenue side of the said Court, as nearly as may be "uniform," authorize the introduction of matters of that nature, new rules of evidence, a new jurisdiction and authority to enforce discovery, a new jurisdiction and authority to grant injunctions, and so on,—if that can be done under that portion of the clause, it certainly does appear to me that the rule, which says that an appeal shall be allowed, bearing, as that rule does, upon the case while in the Court, and in every sense on the Revenue side of the Court, and followed up by the necessary provisions for giving effect to the right so attaching, is not outside the ordinary sense of the words "process, practice, and mode of pleading on "the Revenue side of the Court," certainly not more so than other matters which involve a right not before existing or recognized. It might have been argued that Parliament has not thought fit here to say that the right of granting injunction or discovery, and of making new rules of evidence, shall be adopted; and could it be supposed that so important a matter should be left in the discretion of the Court of Exchequer? The answer is, that the Legislature has trusted the Court of Exchequer, and considered that there may be questions more proper to be considered there than to be determined in the first instance by Parliament itself, as to how far all or any of these provisions are applicable. If all are applicable, so much the better, the object being, as far as may be, to assimilate the procedure upon the Revenue side to the procedure upon the Plea side. I submit again, my Lords, that the power so to determine given to the Court of Exchequer must receive the same construction as

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if the Legislature had exercised that power directly itself, and had said, All the provisions of the Common Law Procedure Act of 1854, or all the provisions applicable to appeals for motions for new trial, shall apply and extend to the Revenue side of the Court of Exchequer. The words will be perfectly susceptible of a just and sound meaning. We have seen that in the Court of Exchequer, and before the cause or the record had in any sense parted from it, these provisions would attach, and all the rest is merely matter of consequence which would follow when those provisions had attached.

My Lords, I conclude by saying that what seems to me to cause the fallacy in my learned friend's argument, is the not attending to the distinction between the exercise of a Parliamentary power to determine whether particular enactments of Parliament shall apply to a particular class of causes or not, and the exercise of a power of legislation which undoubtedly would be entirely beyond the proper jurisdiction of the particular Court if Parliament had not given them to it.

Sir H. Cairns.

Sir Hugh Cairns.—My Lords, it is always desirable, however confident one may feel in one's own case, to hear the other side before attempting to express a strong opinion,—but having had the advantage of hearing one who, I am sure, must have adduced every possible argument that can be adduced, I feel that I may say, until I am told by your Lordships that I am wrong, that the arguments of my learned friend, upon the most cursory examination of them will show that there is nothing to be said in support of the proceeding to which I have demurred before your Lordships.

My learned friend first of all set out with this, which will be found to be an assumption of the whole question in dispute, though it would no doubt advance him a good way if he could establish it. He said that a new appeal,—by which I mean an appeal not existing before,—from the Court of Exchequer, and the appointment of a Court to hear that appeal, is a "process" of the Court of Exchequer. If that is so, then *cadet quæstio.* But at all events he must prove it. *Primâ facie* it is not,—no person need argue that,—and I need not delay your Lordships by saying that, according to our understanding of language, unless a glossary is put upon these words by Act of Parliament, or some authority which we must obey, the donation, the institution, the creation of a new appeal, and of a new Court to hear it, is not a "process" of the Court from which the appeal may come.

Now let us see how it is proved by my learned friend. He turns to the preamble of the first Common Law Procedure Act, which states, "Whereas the process, practice, and mode of pleading in "the Superior Courts of Common Law at Westminster, may be "rendered more simple and speedy." Now, upon that, my learned friend's argument is this: If you read that Act of Parliament through, you will find in it no doubt, a number of provisions which relate peculiarly and clearly to what may properly and strictly be called the practice, pleading, and process of each of the

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Superior Courts of Westminster. But, my learned friend says that you will find in it much more than that. You will find that Parliament deals with errors, abolishes writs of error, deals with the Exchequer Chamber, and deals with the House of Lords, and prescribes for those tribunals the terms and mode in which cases of writs of error shall be taken by them. *Ergo*, says my learned friend, you must come to the conclusion that the whole history of a cause, everything that is done with regard to it in the House of Lords, or in the Court of Exchequer Chamber, is "process, practice, and mode of pleading" in the Superior Courts of Common Law at Westminster. That is his argument.

Lord Chief Justice Erle.—The time was when the parties in the Court of Error came into the Court of Appeal in the original cause by a Queen's writ of error. It was established that the Queen's writ of error should be abolished. Will you have the goodness to consider whether the party bringing error does not bring the opposite party into the Court of Error by virtue of a writ of summons in the Court below, that being the process that brought him in?

Sir Hugh Cairns.—Yes, my Lord, I will deal with it, with your Lordship's permission, when I come to clause 10; that proceeding in error shall be a step in the cause. Now I am meeting the argument which says, that because in this long Act of Parliament you find a number of provisions with regard to the House of Lords and the Exchequer Chamber, and because the Preamble says that, the object is to render more simple and speedy the process, practice, and mode of pleading in the Superior Courts at Westminster, *ergo*, all that takes place in the Exchequer Chamber and the House of Lords must be taken to be practice, process, and mode of pleading of the Superior Courts. My answer is this, — It is the most natural course that can be conceived for Parliament when it addresses itself to the alteration of the internal arrangements of the Superior Courts of Law at Westminster, having that for its object, at the same time, and in the same Act of Parliament, to pursue the history of the causes which originate in those Courts, the practice of which is being dealt with, to pursue those causes into the Courts of Appeal, and to determine what shall be done with those causes in the Court of Exchequer Chamber and the House of Lords. But my learned friend's fallacy is this, because the preamble states one thing, he assumes that the proposition can be reversed, and because the preamble says, "Whereas the practice and mode of pleading in "the Superior Courts of Common Law at Westminster may be "rendered more simple and speedy," my learned friend converts that and says that this is a statement that everything done in the subsequent part of the Act of Parliament is with regard to the process, practice, and mode of pleading in the Superior Courts. I say that that proposition is entirely fallacious; I say it is a perfectly intelligible and simple thing to be told by Parliament, "Our motive in legislating as we are going to legislate is to reform "the process, practice, and mode of pleading of the Superior Courts

"at Westminster;" but it is a fallacy to say that Parliament in so saying pledges itself to do nothing more than to reform the practice of those Courts at Westminster, and not to go beyond them, unless at the same time it expressly affirms that every thing that it deals with is to be brought under and dealt with as the practice of those Courts.

Then, my Lords, I add to that, this,—that the first Common Law Procedure Act dealt with writs of error alone in the accurate and proper sense of the term. I fear my learned friend, the Attorney General, throughout the greater part of his argument, joined together two things which must be kept distinct. The first Act, that of 1852, dealt with writs of error, and with writs of error only. Now it must be always remembered that that was not giving any new right of appeal whatever, it was not creating any new right of appeal,—it was dealing with the existing and the established course of things, by which a suitor had, as a matter of right, a writ by which he might bring the record of the lower Court before an established and recognized constitutional Court of Error to which he was entitled to go. There might be a necessary connection,—I do not say that there is such a necessary connection,—between the original commencement of causes in the Superior Courts of Westminster and the proceedings in error so called. But it is utterly foreign and inapplicable to the new appeal, such as was given under the Act of 1854, that being not a proceeding by way of error, but a novel mode of procedure, which, before that time, was utterly unknown upon the Common Law side of Westminster Hall. And my learned friend forgets that the Act of 1854, which is the Act we have to deal with, has no preamble of this kind whatever.

Lord Chief Justice Cockburn.—Its title is "to enlarge."

Sir Hugh Cairns.—Yes, my Lord; and there is no such preamble as in the other case.

Lord Chief Justice Cockburn.—It is to enlarge the jurisdiction, and to amend the process, practice, and mode of pleading.

Sir Hugh Cairns. — Yes; to enlarge the jurisdiction. The whole argument, therefore, which my learned friend has founded upon the preamble of the Common Law Procedure Act of 1852 may be applicable whenever a case arises in which it is necessary to consider the position of a cause in its different stages of error; but it has no analogy to the case before your Lordships, for, with regard to a cause in error, there always was the Court of Error—there always was the right to have the record taken there by a process instituted for the purpose. No new right was created; no new remedy was given. There was a remodelling simply of the process already existing. I might submit that the mode in which the Court of Error had done its work was a process of the Court of Error, and not of the original Court. But I say that is not the proposition to be argued here. It is not for us to say what is the position of a cause undergoing the different stages of error. What we have to argue is this:—what is the position of a suitor who comes before the Court of Exchequer

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Chamber upon appeal,—an appeal supposed to be given under the Common Law Procedure Act of 1854? Let me, however, before I leave the question of error proper, say a word or two more upon the subject of error under the first Common Law Procedure Act. My learned friend refers to the 155th section, and so I crave to refer to the same section, to show that with respect to error, properly so called, this Common Law Procedure Act takes notice of the proceedings in the Court of Error and the original Court, and makes a distinction between them. It speaks of the one as a matter which must be dealt with in a manner entirely different from the other.

The 155th clause is this: "Upon such suggestion of error "alleged and denied being entered, the cause may be set down "for argument in the Court of Error in the manner heretofore "used; and the Judgment Roll shall, without any writ or return, "be brought by the Master into the Court of Error in the Exche- "quers Chamber, before the Justices, or Justices and Barons, as "the case may be, or the other two Superior Courts of Common "Law, on the day of its sitting, at such time as the Judges shall "appoint, either in term or in vacation; or if the proceedings "in error be before the High Court of Parliament, then before "the High Court of Parliament before or at the time of its "sitting; and the Court of Error shall and may therenpon review "the proceedings and give judgment as they shall be advised "thereon; and such proceedings and judgment, as altered or "affirmed, shall be entered on the original record; and such "further proceedings as may be necessary thereon shall be "awarded by the Court in which the original judgment was "given." What was the necessity for this section at all? The necessity was this: the Common Law did the whole of its work before, if you had a writ of error. But the writ of error was abolished. It was then necessary to confer upon the Exchequer Chamber and the House of Lords a similar jurisdiction to that which they had before. That was conferred upon them; but not conferred upon them as incidental to proceedings in the original Court,—not as if it was a process to be relegated to them. They are treated as two independent Courts; but it is all one procedure, all one practice, all one pleading. And all that is done here is virtually to say, Although the writ of error is abolished, although there is not issuing out of the Court of Chancery the process that there formerly was, although a person desiring to be put in the position in which he was formerly by taking out a writ of error may do it by giving notice, still it shall be done as it was before, by independent Courts, who are left to deal as they think fit with the record brought before them, as they might have done before when the writ of error existed.

I take, in connection with that, the 148th clause in the first Common Law Procedure Act, which makes the proceeding to error, as it is called, a step in the cause: "A writ of error shall "not be necessary or used in any cause." Now I pause there, to observe how evident the intention of Parliament is, and how

evident it is that you might as well have said before that the writ of error was in the cause that had been in the Court below; that argument might just as well have been maintained then. It says "A writ of error shall not be necessary or used in any cause, and "the proceeding to error shall be a step in the cause, and shall "be taken in manner herein-after mentioned; but nothing in this "Act contained shall invalidate any proceedings already taken or "to be taken by reason of any writ of error issued before the "commencement of this Act."

The first observation my learned friend makes upon that is this, that in the Common Law Procedure Act, where this occurs, it does not of course relate to the Revenue side of the Court of Exchequer,—this never applying to the Revenue side of the Court of Exchequer until the Queen's Remembrancer's Act passed. Then it was applied to the Revenue side of the Court of Exchequer, not by any rule of the Court of Exchequer, but by Parliament. Parliament said, and said for the first time, dealing with the Revenue side of the Court of Exchequer, "A writ of error shall "not be necessary." Error shall be a step in the cause,—meaning the revenue cause,—on the Revenue side of the Court. Now I say, whatever may be the effect of that argument, it is not to be considered now; we are not in a proceeding in error now. If in any case it becomes necessary to argue that in consequence of the Queen's Remembrancer's Act there is a continuity,—a greater continuity between the proceedings before a Court of Error, in a cause which commenced on the Revenue side of the Court of Exchequer, and the proceedings which existed in the Court of Exchequer,—it may be argued, at the proper time, but that it is not this case. There is no applicability, as I submit, of this clause, or of a similar clause in the Queen's Remembrancer's Act, to the case now before your Lordships.

Now, my Lords, I take next what my learned friend said when he showed to your Lordships that he thought that the Court of Exchequer in their rules, passed before this case, (I am taking my learned friend's arguments in their order,) had acted upon the principle that they could make rules going beyond the occurrences, to use a comprehensive term, in their own Court, and reaching into the Court of Error. My learned friend, I think, there fell into a very great mistake. What he referred to were those rules which are printed at page 13, and which are headed "Pro- "ceedings in Error."* Let me show your Lordships, before I read them, how extremely different the authority of the Court of Exchequer to make rules as to Proceedings in Error, properly so called, is from any other authority which they possess. A special authority is given to them to make rules for this purpose, as you will find in the Queen's Remembrancer's Act, section 19, where we have these provisions:—"A writ of error shall not be neces- "sary or used in any suit or proceeding in error on the Revenue "side of the Court of Exchequer, and the proceeding to error

* *Vide* Appendix, page iii.

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"shall be a step in the cause, and shall be taken in manner and "subject as to such terms and conditions as to giving bail or "security, as may be directed by any rule or order made by the "Barons under this or any other Act or Acts of Parliament "authorizing the same; provided that nothing herein contained "shall invalidate any proceedings already taken or to be taken "by reason of any writ of error issued before the commencement "of this Act, or before such rules and orders come into effect." This is the first power they have, therefore, with regard to proceedings in error, and with regard to the mode in which they are to be taken. They are to have power to make rules as to the manner of taking proceedings, and as to the terms and conditions of bail and security. But that is not all, for in the 26th section they have, in the earlier part of it, this special power again, which I observed upon before. They have power to make rules for the effectual execution of this Act, and the intention and objects thereof. There is very special reference, therefore, to the things which you have specially done by Parliament. They may make rules, "as to the process, practice, and mode of "pleading on the Revenue side of the Court, and as to the "allowance of costs, and for the effectual execution of this Act, "and the intentions and objects thereof," which, of course, I need not say, does not mean that it is thrown wide to their discretion to make any rules which may be necessary to supplement the provisions of the Act; but given an express enactment for example, with regard to error, then let there be any difficulty as to the *modus operandi*, or any difficulty in obtaining the proceeding in error,—how is any deficiency of that sort to be supplied? By a rule to be made by the Barons; and upon that power they have acted in a manner which is not open to any objection or observation. If, in any of those rules, they have exceeded their powers, of course that could not advance the argument on the present occasion; but it does not seem that they have.

Lord Chief Justice Erle.—Section 19 seems to me to be confined entirely to this,—that the proceeding in error shall be a step in the cause, and shall be taken in manner as may be directed by the Barons. That is entirely the commencement of proceeding in a Court of Error.

Sir Hugh Cairns.—Yes, my Lord, I should think so.

Lord Chief Justice Erle.—Then there is nothing that disposes of the old assignment of error in the Court of Error in the Queen's Remembrancer's Act that I see. Then comes the section in question, which says that the Court shall have power to apply the provisions of the Common Law Procedure Acts, 1852 and 1854, to the Revenue side of the Court of Exchequer; and by virtue thereof, at page 13, they have expressly made the rules how the parties in the Court of Exchequer Chamber shall join issue and come to trial.

Sir Hugh Cairns.—Yes, my Lord; but before your Lordship arrives at the second part of clause 26 you will find that there is another power to make rules for the effectual execution of this

Act, and the intentions and object thereof. Now, my Lords, it is not any part of my argument or duty to consider whether these rules of the Court of Exchequer Chamber at page 13 have exceeded their authority or not.

Lord Chief Justice Erle.—It is a very essential thing to establish the practice and mode of proceeding in error, properly so called, and the Court of Exchequer have applied the Statute exactly as they have in respect of the Court of Appeal. I thought it was *concessum* that they had that power to dispense with the assignment of error and rejoinder of error, and go on as all the rest of the suitors go.

Sir Hugh Cairns.—All that I should desire to say upon the rules at page 13 is this: if they exceed the powers given to the Court they stand *in pari conditione* with the rule which I object to. There is no doubt, with regard to proceedings in error, that they have got some special provisions by Act of Parliament. I need not consider how far that goes. If they are to make rules for the effectual execution of the Act, and the intention and objects thereof, that may enable them to go somewhat beyond what literally is the practice and process of proceeding and pleading in their own Court, inasmuch as this Queen's Remembrancer's Act prescribes the proceeding in error that may be; but I do not desire in the least to say that it is so.

Lord Chief Justice Cockburn.—I do not think that you are at all bound to concede that.

Sir Hugh Cairns.—Not in the least; it is foreign to my argument.

Lord Chief Justice Cockburn.—Whether under the 19th clause, the first power being granted under the 26th section, it would be competent to make further rules with regard to procedure in error than the 19th section gives in express terms, I think is very doubtful indeed; it seems begging the whole matter now in dispute. The question is, whether they can deal with the process of error any further than their own Court, when once the process gets beyond their doors, the question under discussion is, whether they have any further power over it.

Sir Hugh Cairns.—I was only going to say this. It is very singular, when we come to look at the rule, that the the Court of Exchequer on this occasion guarded themselves from the imputation of extending their authority in a very ingenious way; for when they came to make their rule, at least one of the principal rules, namely the 101st, they said this, "The several "provisions contained in the 154th, 155th, 156th, and 157th "sections of the Common Law Procedure Act, 1852, where "applicable shall extend and be applied in like cases on the "Revenue side of the Court," which I understand to mean "where applicable, on the Revenue side of the Court shall ex-"tend,"—leaving it entirely open to say what is a part of the provisions of the Common Law Procedure Act which could be extended to the Revenue side of the Court, and what is not. However, I do not wish to argue more than what relates to my

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own case. Let those who are concerned in these rules either submit to them, or object to them when the time comes; they are not the rules which relate to the present case.

My Lords, the next argument of my learned friend is this: he says, If you look at the Common Law Procedure Act of 1854, and if you begin at the 35th section, which is the overriding section, the section which first gives the right of appeal, you observe that it is coupled with conditions,—the dissent of one of the Judges for example, and the allowance of an appeal by the Judges of the Court below; and my learned friend says, the whole in fact is necessarily mixed up and connected with the occurrences in the Court below, and how can you say that the appeal itself is not amalgamated, as it were, and does not form part of the practice of the Court below? There is hardly a colony of the kingdom an appeal from which to the Court of Appeal does not depend upon the permission of the Court below, difference of opinion among the Judges, and so on; the whole being defined by Act of Parliament to be those things without the existence of which there can be no appeal at all. But from the fact that those things must either exist or not exist in the Court which originally hears the cause, it seems to me to be a complete *non sequitur* to say that because Parliament says there must, as a matter of fact, be occurrences in the Court below, upon which shall depend the question whether Parliament will give the suitor the right of appeal or not, therefore that amalgamates the right of appeal with the proceedings in the Court below, and says that the Court below has jurisdiction over the appeal as part of its own process.

My Lords, my learned friend comes next in point of order to the Queen's Remembrancer's Act; and I was struck by the course adopted by my learned friend. The moment his eye wanders off the 26th clause, and when he states his argument, he glides at once into a fallacy, which will be found to be the fallacy of his whole argument upon the section. He says that the Court of Exchequer has parliamentary power—just as a stranger might have a parliamentary power,—just as any one unconnected with the litigation at all, the Queen in Council, for example, might have a parliamentary power, to apply all or any part of the provisions of the Common Law Procedure Act to all the causes and informations on the Revenue side of the Court of Exchequer. Now, that is not the section. An argument might arise there, (I do not think that it would be a very sound one, but it would be a very different one from the present,) if the power had been given to the Court of Exchequer, either the Barons of it or anyone else, to impress, as it were, an information when once it was filed, with the whole of the provisions of an Act of Parliament such as the Common Law Procedure Act, so that it would attach to that information until it had fully answered its purpose through whatever Court it might go, and before whatever tribunal it might go, to impress upon the information at its first origin a series of provisions with regard to appeal and so on, which, once impressed, would not be removed from the circumstance of its

passing from one Court to another. That is not the Act of Parliament; the Act of Parliament is an authority to apply the provisions of the Common Law Procedure Act, not to all or any of the informations which originate in the Court of Exchequer, but to apply them to the Revenue side of the Court of Exchequer. And I say again that a part cannot be greater than the whole. Supposing it had been not one half of the Court of Exchequer, but the whole of the Court of Exchequer, to apply the provisions of an Act of Parliament to the whole Court of Exchequer, can that possibly mean to fasten upon every suit and every information which has its origin in that Court a quality and rights and liabilities in the suitors which are wholly unconnected with the practice and process of the Court itself, and which belong to the jurisdiction and the domain of other Courts?

My Lords, I could not help being very much struck by the way in which one of your Lordships put to my learned friend a question, and by the answer which he gave to it. The Lord Chief Justice said to the Attorney General, What reason have you to suppose, after Parliament had expressly given the power of bringing error upon special case, the power of bringing error in succession duty and legacy duty cases, and the power of tendering a bill of exceptions, and provisions with regard to writs of error in the proper sense of the term, when Parliament had taken up every case but one in which the Common Law Procedure Act supposed that the proceedings in one Court could be brought under review by another, what reason is there to suppose that Parliament failed to deal with the last and the only remaining case in the Common Law Procedure Act, and said nothing at all upon that subject? Now, my learned friend says (and I will take his own answer) Parliament meant to leave it to the discretion of the Judges of the Court of Exchequer to say whether, in particular cases connected with the revenue, it might or might not be desirable to apply this one remaining provision. It was a very novel provision, entirely new, and unknown in any Court of Law before, and it was impossible to predicate——

Lord Chief Justice Cockburn.—And which in fact has superseded the practice of the old tribunal.

Sir Hugh Cairns.—My learned friend says that Parliament wished to leave the whole of that to the discretion of the Judges of the Court of Exchequer. Now, in the first place, my Lords observe what the consequence of that might be. I am not at all sure that one consequence would not be that any rules which the Court of Exchequer made upon this subject would be entirely fluctuating and changeable from time to time; for this power of making rules, as indeed always the power of making rules for the practice and procedure of the Court, is a power to be exercised from time to time; and I believe that any person who has considered the course of legislation would say that that is one of the great reasons why Parliament, after it has laid down the large cardinal guiding principles with reference to the procedure of the Court, says that there are many subsidiary things

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to be done to work out these particular ends at which it has desired to arrive. Parliament says that those are matters of detail, and of detail only,—not to supersede what it has done, or to alter it, or give new rights, but that those rights which it has given are to be worked out by provisions in detail, which had better be made by the Judges, as they will be most familiar with the details in question; and these details, if they were put into the Act of Parliament, and once made, could not be undone except by similar legislation; whereas the power to make rules from time to time can be brought into operation by the Judges from time to time, inasmuch as they may find that a regulation which they have made on one day does not suit on another day. But, my Lords, (and it is a much more serious question,) if the power is left to the discretion of the learned Judges, or,—I beg leave to correct that, and to say,—a bare majority of the Judges, the Lord Chief Baron and two Barons against the will of the other two Barons,—if the whole is left to their discretion as to a right such as we are speaking of now, a great, new, and highly important right, namely, an appeal by suitors in a way hitherto unknown to the Court,—if it is left to their discretion how far they will introduce it, when they will introduce it, or in what manner they will introduce it, the consequence is this:—They may introduce it piecemeal; they may say, revenue case are very peculiar, they ought not to be litigated so often as a civil case between A. and B. ought to be. Perhaps it is better that after a rule for a new trial there should be an appeal, but we will have it once to the House of Lords. We will pass over the Court of Exchequer Chamber.

Mr. Attorney General.—They are only to apply the provisions of the Common Law Procedure Act.

Sir Hugh Cairns.—They are to take any of the provisions of the Common Law Procedure Act as may seem to them expedient for making the process, practice, and mode of pleading on the Revenue side of the Court as nearly as may be uniform with the process, practice, and mode of pleading on the plea side of the Court;—they have a discretion.

Lord Chief Justice Cockburn.—That would spoil the uniformity.

Sir Hugh Cairns.—But there is not to be complete uniformity, my Lord. That is the peculiarity—it is to be in the discretion of the Judges—it is to be as nearly as they think may be. If these are such peculiar cases they are to be the judges of the extent of the uniformity; and that is the argument of the Attorney General, that Parliament is not in a position to say, *à priori*, that the whole system of appeal which it lays down in civil cases is to be applied to revenue cases, the Judges must say and say from time to time and to what extent and in what manner those provisions are to be applied. If that is so, it necessarily follows that the discretion, if it is worth having at all, must enable them to apply those provisions by degrees and in part without applying the whole as a complete system, because if they are to apply the whole as a system then the question of the learned

Lord Chief Justice, as I humbly submit, becomes unanswerable, namely, "Why did not Parliament do it for itself?" ARGUMENT. Sir H. Cairns.

Lord Chief Justice Cockburn.—I am not aware of any instance in the history of legislation with reference to jurisprudence in which the Legislature has left to a Court a discretion to say whether there shall be an appeal from its decision or not.

Sir Hugh Cairns.—It has never been done. There have been instances where Parliament has given power to an inferior Court with regard to a particular case; for example, as to the importance of it or otherwise.

Lord Chief Justice Cockburn.—That is quite another thing.

Sir Hugh Cairns.—But Parliament has never said, let such and such a Court assemble, and let them say whether, at all times, and in all cases, and under all circumstances, there shall be an appeal from that Court.

Mr. Justice Crompton.—I do not know whether it means at all times and under all circumstances; that would raise another difficulty. I do not know whether it means that they must do it once for all or from time to time, that they may change it and make a new rule, and say there shall be no appeal.

Sir Hugh Cairns.—I will take it either way, my Lord.

Mr. Justice Crompton.—As to some of the rules it might be very expedient to alter and shift them from time to time. I was looking at the statute, and I do not know whether it means a Parliamentary power, to do it once for all, and that then there should be no power afterwards. With reference to some of these rules, it may mean that they shall alter them from time to time. It may be one mode of testing the great question in dispute, whether there is delegated by the 26th section of the Queen's Remembrancer's Act the power to make these rules, or whether it is not restricted to the process, practice, and mode of pleading, which seems to be aimed at in the beginning of the section?

Sir Hugh Cairns.—I was going to say that I do not know which makes the thing the more absurd, whether to suppose that the rules are to be changeable, or to suppose that the thing is to be done once for all. Could anything so absurd be supposed as that the Legislature should say, we will give to a Court the power by three against two to say to-day that there shall be an appeal in all cases to the Court of Error, and to the House of Lords; and by three against two to-morrow, to undo that rule, and to say that there shall be none,—that taking place in the middle of all pending proceedings? There would thus be a power on any day of the week, as the Chief Baron may change, as the majority may change, as minds may change, to do and undo that which may be fatal to the fortune and liberty (because criminal proceedings, proceedings *in rem*, are involved) of the whole of the suitors of the Court. That is one view. Let me take the other view, it is to to be done once for all, and never to be changed. Was such a thing as this ever heard of, that Parliament should let a particular Court assemble to-morrow, and let that Court be the Judge, and be the Legislator, as to whether there shall be an

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appeal, and to whom, and how, and in what form, from that Court, with regard to its proceedings? That is a delegation; that is not the exercise of a Parliamentary power—it is a delegation of legislative power; it is Parliament saying, let the Court legislate for itself and for all the suitors,—not with regard to its own process and procedure,—but let it legislate with regard to all the suitors of the Court; let that Court do to-morrow what we could do to-day, let it decide the very matter which we can decide ourselves, namely, whether there shall be a right of appeal or not from the Court.

Now, the learned Lord Chief Justice of the Common Pleas put this question to the Attorney General, which connects itself with what I have already said. My Lord said, The Queen's Remembrancer's Act having given power to tender a bill of exceptions, and that being in its nature a proceeding attended by certain difficulties,—"cumbrous" I believe it is called, in its form,—may it have been intended that there should be a power in the Court to fall upon and adopt a better kind of proceeding to reach the same end if it thought it desirable to do so? My Lords, if I might suggest to your Lordships the considerations which occur to my mind upon that, they would be these:—In the first place, that was not the course taken by the Legislature in the Common Law Procedure Acts. In the Common Law Procedure Acts no doubt an appeal from motions for new trials was given; I suppose because it was thought to be a more facile and (if I may use the word) handy proceeding than by bill of exceptions. But then, if so, if the Legislature thought that the same thing might be possible with regard to Revenue cases, why should the Legislature delegate the exercise of that power which it had exercised in all other cases to the Barons of the Court of Exchequer? And your Lordships will observe that it is not a power (one could understand the suggestion if it were so) to say in a particular case, on the tender of a bill of exceptions, We see that it would be so difficult to raise the question, that we, who know all the facts of the case, think it better that the question should be raised in that case in another way;—it is a power to make a rule once for all, or at all events for all cases at the time,—not upon a view of the circumstances of any particular case. But it does not stop there, because your Lordships know very well that this proceeding, if it could be adopted on the Revenue side, is not at all the same or approaching the same nature as a bill of exceptions;—it goes very much further. For example, this rule for a new trial might be obtained, and an appeal upon it take place without any tender of any bill of exceptions at the trial,—without any hint or mention at the trial of a bill of exceptions; it would give a right altogether foreign to the course of proceeding upon a bill of exceptions.

Mr. Justice Crompton.—A party might be unable to tender a bill of exceptions. Suppose that a Judge rules against a party, and that party tenders a bill of exception; it goes up to the Court, and the Court may take a different view, and grant a new trial by a majority of three to one. No bill of exceptions can be

tendered by the other party, because the ruling is in his favour, but the appeal may be on a distinct matter. So that the argument is not conclusive, it is merely the adaptation of the power under a bill of exceptions.

Lord Chief Justice Cockburn.—If a point is reserved in favor of one party or the other, whereas before it would have been concluded by the decision of the particular Court, and there would have been no room for a judgment after that, it can now be taken up to the Court of Exchequer Chamber, and can even go to the House of Lords if the party against whom the judgment has been given is dissatisfied.

Mr. Justice Crompton.—There is a new appeal given by the Statute, either directly or indirectly in all these cases.

Sir Hugh Cairns.—I was about to mention this, though I speak with great deference, as it is a matter which I do not know much about. I believe that under a bill of exceptions you could have raised the question of mis-direction, but not the question of non-direction. You could raise the question of non-direction upon a rule for a new trial, and have an appeal upon it.

Mr. Justice Crompton.—It is quite clear that you could not have a bill of exceptions upon a non-direction; whether you could have a rule as against a decision upon a point of law for it, is another question.

Sir Hugh Cairns.—A bill of exceptions takes you at once to a Court of Error, but this proceeding gives you the chance of the four Judges of the first Court, and gives you virtually two Courts, a most important consequence to suitors. I merely mention that to show how different the proceedings are.

But, my Lords, I am satisfied to rest the matter upon the words of the 26th section of the Act, to which, after all, we must come, and with regard to which I now propose to deal with the few arguments of my learned friend.

Now, the first argument of my learned friend upon the words of the 26th section of the Queen's Remembrancer's Act was this: He said, "Suppose Parliament had said, in this Queen's Remembrancer's "Act all the provisions of the Common Law Procedure Acts "shall be applied to the Revenue side of the Court of Exchequer, "what would have been the consequence?" My Lords, I say that I decline to answer speculative questions which have not the slightest analogy to what Parliament has said. If you wish for an analogous case, I will put it. Suppose Parliament, after giving specific powers of bringing error in four or five specific cases, had gone on to say, Moreover, all such provisions of the Common Law Procedure Acts shall be extended to the Revenue side of the Court of Exchequer as will make the pleading, practice, and process of the Revenue side precisely similar, or as similar as may be, to the pleading, practice, and process on the Plea side (and that would be analogous to this case),—then, I say, the question would be the same as that which we have to dispose of, and my answer would be the same. And I say, that if you had an Act of Parliament of that sort, you would make an extension of those

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provisions, and those only of the Common Law Procedure Act which can be properly affirmed to be proceedings regulating the practice, pleading, and process of the Court, and would not in any way give a new right of appeal to any suitor in that Court.

My Lords, my learned friend next says that this cause is a revenue cause in the Court of Exchequer still; that the record is there still; and he says that at this moment, therefore, your Lordships, by some process which I am not sure that I could follow, have before you a case which is really an Exchequer case, and that you are doing all that you may do or may not do with reference to a case which properly ought to be called at this moment an Exchequer case, and therefore is within the words of this section. Now, first let us see as to the accuracy of that statement. I will ask your Lordships to observe how this Queen's Remembrancer's Act draws a distinction between the two Courts in ection 10 as to a special case, it says, "In any suit or proceedings "on the Revenue side of the Court of Exchequer the parties may "at any time before judgment, by consent and order of a Judge "state any question or questions of law in a special case for the "opinion of the Court without pleading; and upon judgment "thereon error may be brought as on a judgment on a special "verdict, unless the parties agree to the contrary; and the pro-"ceedings for bringing a special case before the Court of Error "shall, as nearly as may be, be the same as the case of a special "verdict, and the Court of Error shall either affirm the judgment "or give the same judgment as ought to have been given in the "Court in which it was originally decided, the said Court of "Error being required to draw any inferences of fact from the "facts stated in such special case which the Court below ought to "have drawn;" therefore the Queen's Remembrancer's Act deals in contradistinction with the first Court and the Court of Error—it treats them in separate Courts — it treats the judgment of the Court of Error as the judgment of a Court altogether distinct and separate from the Court in which the first judgment has been given.

But, my Lords, in the next place I say what is the title of the case now before your Lordships? This case upon which your Lordships' opinion is now sought to be obtained is entitled "In "the Exchequer Chamber;" and I ask further, what has any consideration with regard to the record to do with this case? As I understand it, by no possibility can any notice at any time be taken upon the record of this rule in one way or the other. The record is not affected by the rule—the record has no entry of the rule—the record may be lying in the Court of Exchequer, and I have represented it originally to your Lordships as lying in the Court of Exchequer, ready to have a judgment entered up upon it unless something interposes by way of *vis major*. But as regards what your Lordships are asked to do, you are not asked to deal with an Exchequer case, or with an Exchequer record—your Lordships are asked to hear an appeal from a particular order of the Court of Exchequer, not upon the record at all.

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Lord Chief Justice Cockburn.—If the Court of Exchequer have power from the Legislature to make rules affecting our proceedings, then that is part of the law of the land.

Sir Hugh Cairns.—Certainly, my Lord, I quite agree in that, and the argument as I always desire to say, must come round to that, namely, what is the precise construction of the 26th section. But I have to follow my learned friend, who I think preferred to deal with these extraneous matters and analogies rather than with the words of the section, the difficulty of grappling with which he felt perfectly.

My learned friend desired to say that because this might be styled a revenue cause, and because the record was in the Court of Exchequer, your Lordships, by some process which I cannot conceive, might be asked to hear an appeal against an order made by the Court of Exchequer in the course of that cause, which virtually is not in the Court of Exchequer, and to perform some part of the functions of the Court of Exchquer.

My Lords, it seems to me, subject to your Lordships' better opinion, that it is utterly impossible so to argue.

Then my learned friend says, Why in the 26th section is there express power in the latter part of it "to extend, apply, or adapt "any of the provisions of the Common Law Procedure Acts to "the Revenue side of the Court," if nothing more can be done than what properly applies to the pleading, practice, and process of the Revenue side of the Court; because, says my learned friend, that might have been done under the earlier part of the section." He says, under the earlier part of the section the Court of Exchequer have power "to make rules and orders as to the process, "practice, and mode of pleading on the Revenue side," and if that be so, why was it necessary to superadd to that that they may "extend, apply, or adapt any of the provisions of the Common Law "Procedure Acts to the Revenue side of the Court," unless it means something more, and gives them some higher power? Now, my Lords, one sees at once how that argument must recoil upon my learned friend. If my learned friend admits that in the earlier part of the section the rules and orders which can be made are merely as to the process, practice, and mode of pleading on the Revenue side of the Court,, I desire to know how he puts a different construction upon those very same words in the latter part of the section when the authority given is to "extend, apply, "or adapt the provisions of the Common Law Procedure Acts," for the very same purpose, namely, for the purpose of assimilating that very same practice, process, and mode of pleading on the Revenue side to that on the Civil side. The argument would be fatal if my learned friend admitted, as his argument must admit, that under the first part of the section nothing could be done by the Court but to deal with its own practice in that way.

But I will answer my learned friend's argument in another way, The Court of Exchequer themselves have found the convenience of the latter part of this section, for when I take up the rules to which I have already referred, I find at page 11 one purpose

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which this special provision answers, and I will mention another afterwards. At page 11 in No. 75 of their Rules they state, "that "sections 104 to 115, both inclusive, of the Common Law Pro- "cedure Act, 1852, together with the Rules 44 to 49, both in- "clusive, of Hilary Term, 1853, where applicable, shall extend "and be adapted and applied to suits on the Revenue side of the "Court."* Now, I doubt very much whether under the power to make distinct and specific rules for their practice, they could, as it were, accumulate a series of provisions in an Act of Parliament, and in other rules made upon the other side of the Court, and say, you shall take certain rules and apply them, so far as they are applicable to the Revenue side. I doubt whether under a mere power to make rules there would be a reasonable power to make such rules as those.

But, my Lords, I will give another answer. What would be the case with an injunction, for instance? I should doubt very much, with great submission to your Lordships, whether, under a mere power to make rules as to the mode of pleading, the process, and the practice in a court where no such thing as an injunction had ever been known before, a writ of injunction could be created and issued as part of the pleading, the process, and the practice of the Court; but if a power is given to extend such provisions of the Common Law Procedure Act as relate to the practice, pleading, and process of that Court, and among those provisions you find a provision for a writ of injunction, then I can see at once the obvious meaning and purpose of a cumulative power of this kind; first, a power to regulate their practice and proceeding, and then a power to take the provisions of the Common Law Procedure Act which relate to that practice and that proceeding.

Lord Chief Justice Cockburn.—Discovery and inspection would fall under the same category.

Sir Hugh Cairns.—I have a difficulty in saying anything about that, because I am ignorant how far back a Court of Common Law exercised such a right; but an injunction is entirely new.

Mr. Justice Crompton.—Might not everything before the judgment, such as discovery and inspection, be called preceding the judgment? Injunction may be after the suit. In the suit it may be declared to be in it. After the suit it may be an incident to the judgment.

Mr. Justice Williams.—In the 22 & 23 Victoria, in using the phrase, "process, practice, and mode of pleading," the Legislature seem to have studiously followed the phrases used in the two Common Law Procedure Acts.

Sir Hugh Cairns.—Yes, my Lord.

Mr. Justice Williams.—Is the same meaning to be given to both, or not?

Sir Hugh Cairns.—I take it, that in the Common Law Procedure Act, the meaning of "process, practice, and pleading," of a particular kind, would be the meaning which we submit to your

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* *Vide* Appendix, page iii.

Lordships those words have. Of course, the Common Law Procedure Act dealing with a great number of subjects, deals amongst other things with the practice, pleading, and process of one Court or another Court, or all the three Superior Courts of Common Law, and deals also, as I have said, with things outside the Court, namely, appeals to the Court of Error and to the House of Lords.

My Lords, my learned friend thinks that the final words of the 26th section are in favor of his argument,—those words which apply the provisions of the Common Law Procedure Acts "to "the Revenue side of the Court as may seem to them expedient "for making the process, practice, and mode of pleading on the "Revenue side of the Court as nearly as may be uniform with "the process, practice, and mode of pleading on the Plea side of "the Court." My learned friend says, that that is in favor of his argument, because an appeal, he says, is part of the process of the primary Court in civil cases. That is *petitio principii.* I say that an appeal is not part of the process of the primary Court in civil cases,—that it is external to the process of the Court, and that it is entirely foreign to that Court until it is enforced by Act of Parliament.

My Lords, I have only to trouble your Lordships with one further observation. My learned friend referred to what might be the consequence of your Lordships acceding or not acceding to the objection which we take to the jurisdiction. My Lord, upon that I have nothing to say. I do not profess to offer an opinion as to whether, in the event of your Lordships acceding to the suggestions, my learned friend might or might not bring the case by way of review up to the House of Lords; but I claim what I think your Lordships will be of opinion is the right of every suitor. If my objection be acceded to, I fear that I am without my costs of this proceeding here.

Lord Chief Justice Cockburn.—It strikes me very forcibly that it is a matter of considerable doubt whether the Legislature, if applied to for the express purpose, would give an appeal of this nature from the Court of Exchequer in matters of Revenue to these Courts. We can quite understand an appeal to the other two Courts, sitting in the Exchequer Chamber in matters which are part of their common jurisdiction, and of their common practice; but it might be a grave question whether in matters of Revenue, which are peculiarly within the jurisdistion of the Court of Exchequer, the Legislature would have made that enactment, unless we clearly saw our way to that conclusion.

Sir Hugh Cairns.—My Lord, it certainly had occurred to my mind (but I was very unwilling to bring into the argument questions of expediency), that one could see a very tangible and proper reason for the course taken by the Legislature in this matter; these are mainly proceedings *in rem*, for the purpose of affecting the status of certain property; and as we know those proceedings *in rem* will be conclusive, not only between the parties but conclusive altogether; and there may be a very intelligible reason for insisting that any further step by way of review of the

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first proceeding shall be taken in such a way as to have the whole matter upon the record,—that there shall be a record which shall go through its regular stages. The Queen's Remembrancer's Act points out that that which is to be done by the Court of Error by way of judgment shall be done in such a way as that the whole proceedings from beginning to end shall appear upon the record. That whether it be done in the shape of a bill of exceptions or not, there shall be a record, which shall be dealt with by the Court of Error and by the House of Lords, which shall apply at all times and to all persons that determination *in rem* which affects the status of property, and which, when made, is conclusive against all persons. I can conceive (I may be wrong) a very intelligible reason why the Legislature said, We will not have those uncertain applications with regard to rules which may be very suitable in civil cases, but which are utterly unsuitable in cases of this gravity. But whatever the reasons were, I submit to your Lordships that the words are clear and express, and that it is impossible, unless I hear the contrary from your Lordships, to get over the plain and obvious and natural construction of those words.

Mr. Attorney General.—My Lords, I believe that, according to the usual practice, I have a right to speak after my learned friend. I submit that the Attorney-General always has a right to the last word; that is my impression. If that be not the rule, I will not ask for it; if it be the rule, I will not say much.

Sir Hugh Cairns.—My Lords, if I might say so, that involves the question of jurisdiction first. There is no jurisdiction.

Mr. Attorney General.—There can be no doubt whatever that my learned friend and I are here contending parties before your Lordships.

Lord Chief Justice Cockburn.—We are only anxious to know whether any rule has been laid down upon the subject. I do not remember a case myself.

Mr. Attorney General.—I am under the impression that a rule has been laid down.

Queen's Remembrancer.—In an argument in error in the Exchequer Chamber, the Attorney General has the right to reply.

Sir Hugh Cairns.—That would be quite different. In an argument in error only one counsel is heard on each side.

Mr. Attorney General.—If the Attorney General is respondent, my impression is that he has a right to the last word. I certainly shall use it most sparingly if that right be conceded upon this occasion.

Mr. Justice Crompton.—How is it on common motion in the Court of Exchequer?

Mr. Attorney General.—My Lords, I believe that the Attorney General has the last word beyond all question.

Mr. Justice Crompton.—This is a motion, in fact, to the Court.

Their Lordships consulted together.

Lord Chief Justice Cockburn.—The Court will hear you, Mr. Attorney General; but we wish to add, in order that this

may not be considered as establishing a practice, that it is laid down in the case of O'Connell and others against the Queen, in the House of Lords, that it is not a necessary incident to cases in which the Crown is defendant in error, that the counsel for the Crown is to have the last word. But we think it is fully open to us, in the exercise of our discretion to hear you, and therefore we will hear you in reply.

Mr. Attorney General.—I have only one or two observations to make in consequence of my learned friend in his reply confounding two things which are extremely material to be distinguished, and which are distinguished upon the face of this Act of Parliament; I mean orders made by the Court of Exchequer as of its own authority concerning a matter in its own province, and orders made for the mere purpose of declaring under a statutory power that the particular provisions of an Act of Parliament shall apply to the particular subject of appeal, a power which, when exercised, leave the case under those provisions and not as under an order of the Court; and therefore such orders are different in kind from mere orders of the Court made concerning matters over which the Court has an original power. Parliament has said the Court may for certain purposes apply the provisions of certain Acts of Parliament to the Revenue side of the Court. When that has been done, the function of the Court is at an end, and the Act of Parliament operates, because Parliament has said upon that condition the provisions shall operate by virtue of the Statute itself; and therefore the notion of its being possible, under the words "from time to time," to recal those provisions is wholly out of the question. Your Lordships will recollect the words are not "from time to time by "by any such rule or order to extend, apply, adapt, or *recal*," but "from time to time to extend, apply, or adapt." When that has been once done, when the provisions of the Act of Parliament are once extended or applied, they are extended and applied for ever, unless Parliament itself afterwards should choose to make a change; and therein is the difference between the application, under Parliamentary power, of an Act of Parliament and the passing of rules or orders of the Court which the Court may revoke or not at its own pleasure. Bearing that in mind, it is not at all surprising that some matters may be beyond what would be the competency of the Court if dealing with its own particular province; because Parliament has dealt with that which is within the province of Parliament, as everything is, and it has given to the Court simply the power of saying whether those provisions shall or shall not be applied to a particular subject, namely, to the Revenue side of the Court; and that which applies to these proceedings by way of appeal, is just as applicable to an injunction, or anything that gives a new jurisdiction. An order is made extending the Injunction Clauses of the Common Law Procedure Act to the Revenue side; therefore, a judgment may be now pronounced, which never could have been

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before pronounced. Whether that is now subject or is not subject to appeal, no such appeal existed before, because no such power existed before; but that power comes in under those general words which enable the Court to apply any of the provisions of the Common Law Procedure Act to the Revenue side.

I may add this observation, that though the phraseology may be said to refer, *primâ facie*, to the process, practice, and mode of pleading on the Revenue side of the Court, yet the power is to apply "to the Revenue side of the Court;" and is not the natural interpretation of that to all causes upon the Revenue side? My learned friend did not contest the proposition that that would be so if Parliament itself had said that all the provisions of those Acts should be applied to the Revenue side of the Court. Such a declaration would carry with it everything depending upon them, because all the preliminaries which made the matter appealable, and gave it the character of an appealable proceeding, would have taken place in a cause on the Revenue side, and in the Court itself. Then, I say, the words which are added simply show the purpose, confirming instead of disturbing that conclusion, namely, the purpose of enabling the Court, as far as possible, if it thinks fit, to assimilate the proceedings on the one side and the other.

The only other point upon which I wish to make an observation is this: I must submit to your Lordships that the right of appeal is merely the same in another form which is given by a bill of exceptions; and there is no foundation for the suggestion that there is any difference whatsoever in substance between the two cases. The clause we are dealing with is the 35th. The learned Chief Justice referred to the 34th, which we are not now upon, and which is a subject of distinct consideration; but the 35th clause is strictly limited to the case of a motion for a new trial on the ground that the Judge has not ruled according to the law. It is perfectly clear that that might at all times have been the subject of a bill of exceptions. I did not quite follow the observation of one of your Lordships upon that point ——.

Mr. Justice Crompton.—The case I put was this, that the party would not have his remedy by a bill of exceptions, and that, therefore, he had a new right given him. I put the case of a party trying his cause, and the Judge ruling in his favour, he cannot tender a bill of exceptions. Then when the case comes to the Court above, the Court grant a new trial on the point of law, in favour of the other side who have not the power of tendering a bill of exceptions. The party might get his remedy by having the case carried down again. But in point of fact there is an immediate appeal to the appellate jurisdiction, because, supposing three of the Judges ruled in his favour, and one ruled against him, then he would have a remedy, which he would not have by a bill of exceptions.

Mr. Attorney General.—It accelerates the appeal to which ultimately he would have a right when the cause went down again; because the effect of such a ruling by the Court which

orders a new trial would be, that at the trial the law would be so laid down that he would then have his right to raise the same question by a bill of exceptions; it avoids multiplicity of procedure and delay.

Mr. Justice Crompton.—It gives an appeal on motion.

Mr. Attorney General.—But is not that procedure? If it gives an appeal on motion only in a case in which, in that stage, or in a later stage, the same matter of law might have been made the subject of appeal by a bill of exceptions, is it not merely an improvement and simplification and amendment of procedure? I submit that it is.

I must ask your Lordships to pardon me for a moment if I avail myself of the opportunity offered me of making these remarks, to set myself right as to words which I used before, which might possibly be understood in a sense which I did not intend to convey. I did not mean to impute, upon any hypothesis, to any person whatsoever, much less to your Lordships or any other Court, injustice in this case. I merely meant to say, that under the circumstances of this case there would be a practical failure of justice if it should turn out that these rules are *ultra vires;* because this was a case in which the matter was ruled as matter of law, with which view the Crown took the necessary steps to get a bill of exceptions; but owing to certain difficulties, for which I do not presume to blame any person whatever, it appeared to the Court that the matter would be more conveniently determined if this form of procedure could be adopted than if the form of a bill of exceptions were adopted. Therefore, I meant to say, that the practical result would be a failure of justice, not meaning to impute intentional injustice to any person whatsoever.

I pass from that, and I have only to add this, that the 34th section, which refers to what the learned Chief Justice noticed upon points reserved at the trial, depends upon consent; and it is clear that no inconvenience can arise in that case, it depending upon consent; and it has been, I think, determined, upon the construction of that section, that it can only have application to a consent given subsequently to the time when the Act has come into operation as to the particular matter.

Then, my Lords, I have this one thing more to say. It was suggested by the learned Chief Justice for consideration, whether perhaps the Legislature might not have thought that as a matter of policy it would not be fit to apply this mode of appeal to the Revenue side. If I am right in saying that it is merely a simplification of procedure applying only to a case where there is a right of appeal, I do not think there is any ground for doubting that the Legislature might well confide to the Court of Exchequer the duty of considering whether there was anything in the nature of Revenue causes which made that form of procedure less applicable there. There would be a record in the end; that is quite clear; and, therefore, for the purposes of proceedings *in rem*, it would ultimately make no difference whatever; and it is as beneficial to the subject as to

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the Crown. A case of this kind may be determined against the subject; and surely it would be a benefit to the subject in that case to have a right of appeal—the Crown claims nothing for itself that it does not give; and certainly, if we look to the language of the Act, we shall not find anything to lead us to the conclusion that this was meant to be excepted from the general power which is given by the Act.

Lord Chief Justice Cockburn.—The Court will give judgment on Monday morning.

JUDGMENT

DELIVERED

Monday, 8th February 1864.

Judgment on objection to New Rules of Court of Exchequer.

Mr. Justice Mellor.—After a careful consideration of the arguments which were urged by the Attorney General in this case, and with every desire to support the validity of the rules made by the Court of Exchequer on the 4th of November last, under the provisions of the 22nd and 23rd Victoria, chapter 21, intituled "An Act to regulate the office of Queen's Remembrancer, and to "amend the practice and procedure on the Revenue side of the "Court of Exchequer," I am compelled to come to the conclusion that the Rules 1, 2, and 3, under the authority of which the present appeal is brought, are not warranted by that statute, and that the claimants are entitled to succeed upon the objections which were made by Sir Hugh Cairns to our proceeding with the cause.

In order to sustain the right to appeal, the Attorney General was driven to contend that the Legislature, in providing for the amendment of the "practice and procedure" on the Revenue side of the Court of Exchequer, had incidentally delegated to the Lord Chief Baron and two or more Barons the power to determine whether or not an appeal should lie from a judgment of their own Court, in certain cases, to the Court of Exchequer Chamber and the House of Lords. The suggestion is of a power so unusual, that it appears to me to require a clear and unambiguous expression of the intention of the Legislature that such should be the case in order to support it.

In the Common Law Procedure Act of 1852, the Legislature, after making many express alterations and amendments in the process, practice, and mode of pleading in the Superior Courts of Law, did, by section 223, confer upon the Judges or any eight or more of them, of whom the chiefs of each of the said Courts should be three, power from time to time to make all such general rules and orders for the effectual "execution of the said Act," and of the intention and object thereof, &c., "as in their judgment might be "necessary and proper;" but it gave no larger power than was necessary in order to enable the Judges to make such rules and orders as were incidental to the complete carrying into effect of the alterations and amendments made by the Legislature itself. The Common Law Procedure Act of 1854, which was for "the further "amendment of the process, practice, and mode of pleading in,

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" and enlarging the jurisdiction of the Superior Courts of Common " Law," was framed upon similar principles; and by section 32 it expressly gave to litigants the right to bring error on a special case in the same manner as on a special verdict. By section 34, in case of rules to enter a verdict, or for a nonsuit upon a point reserved at the trial, it gave the power to appeal against the judgment of the Court "in refusing, discharging, or making absolute " such a rule." By section 35, in cases of misdirection, it conferred a similar right of appeal from the judgment of the Court in the event of one Judge dissenting, or of the Court in its discretion granting permission to appeal; and by section 36 it enacted that the Court of Error, the Exchequer Chamber, and the House of Lords should be Courts of Appeal for the purposes of that Act. By the 97th section it gave power to the Judges, under the like conditions as in the Procedure Act of 1852, to make several general rules and orders for the effectual execution of the Act.

I have referred to the several sections of the Common Law Procedure Act of 1854, because they contain the provisions which the Court of Exchequer has by the rules of the 4th of November assumed to extend, apply, and adapt in order to provide a remedy by way of appeal to the particular circumstances of the present case.

Upon the passing of the Common Law Procedure Act of 1852, the Judges did make general rules, regulating the pleading and practice of the Superior Courts of Common Law, in conformity with the power conferred upon them by that Act.

In the Act of the 22nd and 23rd Victoria, chapter 21, now under consideration, the Legislature appears to me to have provided for certain cardinal alterations in the practice and procedure on the Revenue side of the Court of Exchequer, and to have given new, but special and limited, rights of appeal to litigants, and, as was done in the Common Law Procedure Acts, to have left the details necessary to carry them into effect to the discretion of the Judges of the Court of Exchequer.

By section 10, the Act enables litigants, by consent and by order of a Judge, to state any question of law in a special case, for the opinion of the Court, without pleadings; and upon a judgment thereon, error may be brought as on a judgment on a special verdict, unless the parties agree to the contrary; and it provides that the proceedings for bringing such special case before the Court of Error shall be the same as in the case of a special verdict, except that the Court of Error is to be required to draw inferences of fact which the Court below ought to have drawn.

By section 11 the costs of the proceeding are regulated. By section 12 an appeal is given to a Court of Error from a decision of the Court of Exchequer in appeals under the provisions of the Succession Duty Act, 1853; and by section 13 it is expressly enacted that such appeal shall lie to the Court of Error in the Exchequer Chamber, and that the decision of the said Court of Error shall be subject to appeal to the House of Lords. By section 15 further provision is made for bringing error on special cases, to be stated with reference to Legacy Duty; and by sec-

tion 16 the powers of the 1st William 4th, chapter 22, and sections 46, 47, 48, and 49 of the Common Law Procedure Act, 1854, are expressly incorporated into that Act. By section 19 it is expressly provided that a writ of error shall not be necessary, and that the proceeding to error shall be a step in the cause. By section 20 power is expressly given to either party to tender a bill of exceptions on the trial of any issue; and section 21 provides for the costs of all suits, informations, and other proceedings.

By these sections a power to state a special case, a power of appeal in certain cases, and a power to each party to tender a bill of exceptions on the trial, are carefully and specially provided for; but no appeal is given against the judgment of the Court on granting, refusing, making absolute, or discharging a rule for a new trial, or to enter a nonsuit or a verdict upon a point reserved at the trial.

There may be, and probably are, considerations which might render such a power inexpedient in Revenue suits, and it can scarcely be imagined that the propriety of giving such a power escaped the consideration of the Legislature when the special provisions above referred to were framed. The omission of such a power whilst other provisions are made for appeal and writs of error, leads me to the conclusion that this larger power of appeal was intentionally omitted from the Act. The answer attempted to be given to this view is, that the *right of appeal* is matter of practice confounding as it appears to me the distinction between the right and the *rules* which regulate the *right*, and it is contended that by section 26 power is given to the "Lord Chief "Baron and two or more Barons," not only to make rules and orders as to the process, practice, and mode of pleading on the Revenue side of the Court for the effectual execution of the Act, but also "from time to time by any such rule or order to "extend, apply, or adapt any of the provisions of the Common "Law Procedure Acts of 1852 and 1854, AND any of the rules of "pleading and practice on the Plea side to the Revenue side of the "said Court, as may seem to them expedient *for making the pro-* "*cess, practice, and mode of pleading* on the Revenue side of the "Court as nearly as may be uniform with the process, practice, and "mode of pleading on the Plea side of the said Court." It is argued that this clause gives an absolute discretion to "the Lord "Chief Baron and two or more Barons" to incorporate with the Act under consideration any provision of the two Common Law Procedure Acts of 1852 and 1854, whether it gives new remedies to the subject, or enlarges the jurisdiction of the Courts, or gives a new authority to the Court of Error in the Exchequer Chamber and to the House of Lords, or only alters or amends the process, practice, and mode of pleading in the Superior Courts of Common Law.

ur e it is more reasonable to consider that a power which is to be exercised "from time to time" is more applicable to the extension, application, and adaptation of such provisions of the Common Law Procedure Act as refer to "process, practice, and "pleading" in their ordinary sense, and which may well be altered

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and amended from "time to time," than to provisions which confer new remedies and enlarged jurisdiction. This is made more apparent when it is considered that the reference to the provisions of the Common Law Procedure Acts is immediately followed by the words, "and rules of pleading and practice on the Plea "side of" the said Court as may seem to them expedient for making the process, practice, and mode of pleading on the Revenue side of the said Court as nearly as may be uniform with the "process, practice, and mode of pleading" on the Plea side of the said Court. I can readily understand that the Legislature may have entrusted "to the Lord Chief Baron and two or more "Barons" power to make rules and orders, and to apply and adapt such provisions of the Common Law Procedure Acts, and such rules of pleading and practice as affect "process, practice- "and the mode of pleading," so as to carry into effectual opera, tion the alterations in the practice and procedure of the Revenue side of the Court of Exchequer introduced by the Act. But I cannot understand the policy of intrusting to the Lord Chief Baron, and two more Barons of that Court, the power to determine whether or not the Court of Error in the Exchequer Chamber and the House of Lords shall have jurisdiction to entertain an appeal against a judgment of the Court of Exchequer in granting, or refusing, or discharging a rule for a new trial. The limited power to make rules and orders conferred upon the Judges by the Common Law Procedure Acts required for its exercise a quorum of eight, of which the three chiefs of the Courts were to be members; but, according to the argument of the Attorney General, the present Act has conferred this most unusual and unprecedented authority to legislate for the Court of Error and the House of Lords upon a bare majority of the Barons of the Exchequer. I cannot adopt that view; and inasmuch as I cannot consider the rules of the 4th of November, as warranted by the statute 22nd and 23rd Victoria, I come to the conclusion that we have no jurisdiction to proceed with the appeal, and that it must therefore be dismissed. If I am wrong in the opinion which I have formed, and the rules are really authorized by the Statute, the House of Lords will, by virtue of the very rules in question, have power to give the judgment which we ought to have given.

Mr. Justice Blackburn.

Mr. Justice Blackburn.—In this case the defendant in a case on the Revenue side of the Court of Exchequer has obtained a verdict at the trial; a rule to set aside that verdict, and grant a new trial on the grounds of misdirection, has been obtained in the Court of Exchequer, and, after argument, discharged. The Attorney General has come to this Court, treating it as a Court of Appeal from the Court of Exchequer on this matter, with the object that we should inquire into the grounds of the decision, and, if satisfied that the Court of Exchequer ought to have made the rule absolute, that we should now do so, and set aside the verdict obtained for the defendant. The defendant has objected to our jurisdiction to entertain the cause, contending that we are not a Court of Appeal

from the Exchequer on this matter, that the decision of the Court of Exchequer is final, and that he has a right, in point of law, to retain his verdict undisturbed.

I am, I think, as a Judge, bound to form my opinion on this as a matter of law, and to deliver judgment according to what I think is the law, without inquiring whether the result, as affecting this particular case, is satisfactory or not; and after considering the case carefully, I have come to the conclusion that the defendant is right on this point, and that we have no power to interfere with the verdict.

The whole question depends upon the construction of the 22nd and 23rd Victoria, chapter 21. That Act does not itself give the power of appeal; but it contains a section, the 26th, which gives power to the Lord Chief Baron, and any two or more Barons of the Court of Exchequer, from "time to time, to make all such "rules and orders as to the process, practice, and mode of pleading on the Revenue side of the Court, and as to the allowance of "costs, and for the effectual execution of this Act, and the intention and objects thereof, as may seem to them necessary and "proper; and also from time to time, by any such rule or order, "to extend, apply, or adapt any of the provisions of the Common "Law Procedure Act, 1852, and the Common Law Procedure "Act, 1854, and any of the rules and practice on the Plea side of "the said Court, to the Revenue side of the said Court, as may "seem to them expedient for making the process, practice, and "mode of pleading on the Revenue side of the said Court, as "nearly as may be, uniform with the process, practice, and mode "of pleading on the Plea side of such Court."

In intended pursuance of this power, rules have been made in last Michaelmas term, of which the following seem to me material. By the 2nd rule an appeal is allowed in such cases as the present. By the 3rd, the Exchequer Chamber and the House of Lords are constituted Courts of Appeal for that purpose. By the 7th, it is prescribed that the Court of Appeal shall give such judgment as ought to have been given in the Court below; and by the 8th, the Court of Appeal shall have power to adjudge payment of costs, and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process and otherwise.

If the Chief Baron and Barons of the Exchequer had power given them by the statute to make enactments to the effect just stated, then, no doubt, the appeal lies, and we ought to hear it. Each of the rules I have above quoted is a transcript of a provision in the Common Law Procedure Act, 1854; by sections 35, 36, 41, and 42 of which Act these powers are given to the House of Lords and the Court of Exchequer Chamber in all civil suits between subject and subject, including those that originate on the Plea side of the Exchequer, as well as those originating in the Queen's Bench, Common Pleas, Common Pleas of Lancaster, and the other Courts of Records to which the Common Law Procedure Act, 1854, applies; and if the true construction of the 22nd and 23rd Victoria, chapter 21, section 26, is that the Lord Chief Baron and two or more Barons can apply any of the

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provisions of the Common Law Procedure Act, 1854, to all suits which originated on the Revenue side of the Court of Exchequer at all stages, after the litigation has passed out of the Court of Exchequer, as well as while still in the Court of Exchequer, no doubt that power has been exercised. Certainly a power so extensive as this is not one which one would expect to find given to the Judges of any Court. The regulation of the process, practice, and mode of pleading in any Court involves a great many questions of detail, and therefore may properly be delegated by the Legislature to some one; and when it is delegated at all, the power is naturally confided to the Judges of that Court. But it seems highly improbable that the Legislature should intend to delegate to any one a discretionary power to determine whether the Exchequer Chamber and the House of Lords should or should not have a new jurisdiction which they had not before,—to prescribe to the Exchequer Chamber and the House of Lords how they should exercise that jurisdiction,—and to give to the Exchequer Chamber and the House of Lords new powers of awarding process to enforce this jurisdiction. Whether these things should be done or not is a question of principle, which the Legislature ought to determine for itself. Still less likely is it that they would delegate this power to the Judges of one Court, to be exercised from time to time without any limit as the time within which the power was to be exercised. It was perfectly competent for the Legislature to do so; but before construing the Act in such a way as to produce this startling result, we ought to see the intention to do so pretty clearly expressed. Now section 26, in terms, gives power to the Barons to apply the provisions of the two Common Law Procedure Acts to the process, practice, and mode of pleading on the Revenue side of the Court of Exchequer, with the purpose of making it, as nearly as may be, uniform with the process, practice, and mode of pleading on the Plea side of the Court of Exchequer. These words seem to me to show an intention to confine the power to the process, practice, and mode of pleading in that Court, and whilst the cause is before that Court. I do not think that in any fair and ordinary construction of language the judgment of the House of Lords, reversing or affirming the judgment of a Court below, or the award of process by the House for the purpose of enforcing their judgment, can be considered part of the process, or practice, or mode of pleading of that Court below. I think that it would be a great strain upon the words to construe them so as to include such matters in them; and, as I have already said, I think that it is so improbable that the Legislature meant to include them in the power given to the Lord Chief Baron and the Barons, that the intention ought to be clearly shown.

Hitherto I have only referred to the 26th section, and reasoned as to its construction from the terms of that section alone; but when we look at the whole Act of the 22nd and 23rd Victoria, chapter 21, and construe section 26 as a part of the whole statute, I think that, according to the ordinary rules of construction of a statute, it becomes clear that the Legislature did not intend to give the power of appeal in cases on the Revenue side of the Exchequer.

Before the Common Law Procedure Act of 1852, a writ of error might issue to remove the record of a cause in the Exchequer, whether it was on the Plea side or the Revenue side of that Court, and the Court of Error might examine into any errors apparent on the record, but nothing else. In suits between subject and subject, a further power had been given to tender a bill of exceptions, and thereby to annex to the record a statement of the direction of the Judge to the jury, and thereby to bring any alleged misdirection before the Court of Error; but that power had not been given in suits in which the Crown was a party, and consequently not in proceedings on the Revenue side. The Act of 1852 made many alterations in the form of the writs of summons and execution, and other matters properly called process, and also in the practice and also in the mode of pleading; and it also contained a series of enactments, beginning with section 146, as to error, and the manner in which, after error has been brought, the proceedings are to be conducted in the Court of Error. The Attorney General argued that because the preamble of the Act of 1852 recited that it was expedient that the process, practice, and mode of pleading of the Superior Courts should be rendered more simple and speedy, therefore the enactments relating to error in that Act must relate to process, practice, or mode of pleading. I think Sir Hugh Cairns gave the true answer when he said that in all Acts were many provisions going beyond the scope of the preamble, which merely pointed out the principal object of the Legislature. He also argued that there was a necessity for the more extensive construction of section 26, in order to work the provisions as to the mode of proceeding in error. I think this is not so. In the 22nd and 23rd of Victoria, chapter 22, by section 18, the Legislature make an enactment equivalent to sections 146 and 147 of the Common Law Procedure Act of 1852; but when they come to section 148, there is a difference made, which I think is very important. By the Common Law Procedure Act, 1852, section 148, it is provided that "a writ of error shall "not be necessary or used in any cause, and the proceeding in "error shall be a step in the cause, and shall be taken in "manner herein-after mentioned." The 19th section of the 22nd and 23rd Victoria is in the same precise words till it comes to the manner in which error shall be taken, that is, to be "in manner and subject *as*" (a word I presume inserted by a clerical error) "to such terms and conditions as to "giving bail or security as may be directed by any rule or "order made by the Barons under this or any other Act," &c. It seems to me that the express power here given to the Barons to regulate by rule the manner in which error shall be taken, not only puts an end to the last-mentioned argument of the Attorney General, but also affords a strong argument that the Legislature did not suppose that the power to do so was included in the power given by section 26. Again, the Common Law Procedure Act of 1854, by section 32, allowed error to be brought upon a special case. The Legislature, in the 22nd

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and 23rd Victoria, chapter 21, section 10, enact the same thing in the same words; and in section 20 the power to tender a bill of exceptions is expressly given. We find the Legislature providing by express enactment for error on a special case, for making error a step in the cause, and for a bill of exceptions. The power of appeal was created by the Act of 1854, section 35, and those following it; it is a different kind of proceeding from error, and it is nowhere expressly mentioned in the 22nd and 23rd of Victoria, chapter 21. There were four matters, and, so far as I know, only four, in which the mode of questioning in a Court of Error the decision of the Exchequer on a matter arising on the Plea side, differed from the mode of questioning its decision on a matter arising on the Revenue side. When the Legislature expressly enact that three of those shall apply to the Revenue side, it seems to me to afford a strong argument that the Legislature did not intend the fourth, namely, the power of appeal, to apply to them. *Expressio unius est exclusio alterius.* Surely the spirit of that maxim applies here. It was said by the Attorney General, when pressed by this argument, that it might be that the Legislature thought it quite certain that error on a special case was expedient, and therefore enacted expressly that it should be, but that they were not sure whether the power of appeal would be expedient, and so delegated to the Lord Chief Baron and the Barons the power to determine that for them. Such humility on the part of the Legislature as this, amounting to an admission of their incompetency to determine a point, not of detail but of principle, is conceivable; but I cannot think it so probable as to justify me in straining the words of section 26 out of their ordinary sense, for the purpose of making them express such humility. It seems to me that a far more natural solution is afforded by what my brother Bramwell stated in the Court below (page 14). It appears from what he says that the officers of the Revenue thought that the power of appeal was inexpedient. It has been assumed rather hastily, both in the Court of Exchequer and in this Court, that this was an unreasonable thought, and that when it was determined that a bill of exceptions might be tendered, it ought to have followed, as of course, that an appeal should be given. But it is to be recollected that Revenue cases are confined to the Court of Exchequer, and that consequently the members of that Court acquire in Revenue matters an experience not possessed by the Judges of the other Courts; but the trials at Nisi Prius on Circuit are now before any Judges. It might, therefore, be reasonably expected that the comparatively inexperienced Judge would readily reserve points for the more competent tribunal; and it might be thought, that if an appeal were given wherever a point was reserved, there would be delay and vexatious litigation, to the detriment of the Revenue. Consistently with this, it might be thought that a bill of exceptions would seldom be tendered, except on some point on which the opinion of the Court of Exchequer was already known, and which was

of importance. I do not say that these suggestions are good, but only that they are plausible enough to make it far from improbable that the officers of the Revenue had influence enough to cause the Bill to be prepared with the deliberate intention not to give the power of appeal. However this may be, I think, for the reasons I have given, that the true legal construction of the Act is, not to give that power.

Entertaining this view of the law, I am bound (with whatever regret as to this particular case) to say, that I think that this Court ought not to hear the appeal. I think, however, that we ought not to do anything which can in the least impede the taking of this Appeal to the House of Lords. I think our judgment should be, that the Appeal be dismissed. If the Attorney General is right in saying that we are bound to give the judgment which the Court of Exchequer ought to have given, the judgment I propose would be erroneous, and on appeal the House of Lords would set it right, and (as, on that supposition, the House would be bound to do,) pronounce the judgment which this Court ought to have pronounced.

Mr. Justice Willes.—I am of opinion that an appeal well lies in this case, and that the present appeal ought not to be dismissed. Of course, for the purpose of founding any proceeding by way of appeal against the judgment of one of the Superior Courts of Law at Westminster, it is necessary to produce statutory authority; and I am of opinion that there is statutory authority for this appeal in the 26th section of the 22nd and 23rd of Victoria, chapter 21, and for the action which the Barons of the Court of Exchequer have taken upon that section by making the rule extending the power of appeal granted between subject and subject in the Common Law Procedure Act of 1854, to cases on the Revenue side of the Court of Exchequer as between the Crown and the subject. Of course this question depends altogether upon the construction of that 26th section; and many objections have been taken to applying it to the support of the rule made in the Court of Exchequer in the present case.

With respect to the objection that that rule, so construed, would be a delegation of legislative authority, I think that must fail in the mind of any one who considers the numerous instances of a similar delegation within the experience of us all. The course of pleading, for instance, in the Courts which I may call Courts of first instance, was always considered to be as much a part of the law of the land as any substantive rule for determining a right of property or any other right; and it was always held that such a law could not be changed without the authority of Parliament, and yet the noble and learned framer of the Act known as Parke's Act, the 3rd and 4th William the Fourth, chapter 42, conferred upon the Judges the power in effect of legislating with respect to such a portion of the law of the land. It is true that the power given in that Act was subject to the rules being laid for a certain period before Parliament. But inasmuch as Parlia-

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ment, without the Crown, could not make a law,—inasmuch as Parliament constitutionally could not give its assent to an Act of Parliament simply by having the paper upon which the Bill was written or printed laid before it, and inasmuch as in form and substance the assent of the Crown could only be given when both Houses of Parliament were present, in effect the power of legislating was given to the Judges with respect to such portion of the law. I conceive that the right of appeal is no more important a part of the law, and, indeed, it is less important because it is resorted to in rare cases, than the form of proceedings which take place every day in the Superior Courts, and by means of which the rights of subjects are ascertained and enforced. Now after referring to such an instance as that one is almost ashamed to refer to the numerous cases in which towns and other local communities are allowed to determine by the voice of a majority whether certain Acts of Parliament for local government shall or shall not have power within the limits in which the inhabitants reside; and to make amends for referring to such an instance, I shall content myself, for a proof that the delegation of legislative power is no objection, with referring to the 228th section of the Common Law Procedure Act of 1852, by which Her Majesty in Council was authorized to direct that all or any part of that Act of Parliament, making very great changes indeed in the law, should apply to all or any Court or Courts of Record in England or Wales, and that without any authority of the House of Lords or the House of Commons.

So much with respect to the delegation of legislative power. I shall now turn to the section itself, and endeavour to ascertain whether that section does delegate to the Barons of the Exchequer the power of making such a rule as they have made in the present case. I am of opinion that it does. Assuming that there is nothing in the objection that Parliament cannot delegate its authority to this extent, in which I think it is proved that there is nothing having in view the instances of delegation to which I have referred, is there a delegation of such a power as has been exercised in the present case. At this stage of the argument I am entitled to assume, as was put by the Attorney General in his argument, that instead of delegating the power to the Court of Exchequer, and the Court of Exchequer exercising such power, the Legislature had made this enactment themselves; and then all I have further to do is to see whether the 26th section is large enough to cover the extent of the rule made by the Court of Exchequer in terms, assuming such a rule to have been made in the form of an enactment by the Legislature itself. Now for the purpose of testing that, I must strike out the word "any," "any of the provisions of the Common Law Proce-"dure Act, 1852, and the Common Law Procedure Act, 1854," and I must read "such of the provisions of the Common Law "Procedure Act, 1852," and so on, and I must strike out "as may "seem to them expedient;" because I am now assuming that it appears to the Legislature to be proper—as may seem to them

expedient for making the process, practice, and mode of pleading on the Revenue side of the Court of Exchequer the same as that on the Plea side. Well then, if the enactment be "to extend, apply, and "adapt such of the provisions of the Common Law Procedure Act "of 1854," which is the Act with which we are dealing, as are proper for "making the process, practice, and mode of pleading on "the Revenue side of the said Court as nearly as may be uniform "with the practice, process, and mode of pleading on the Plea side "of such Court,"—to deal with such an enactment, all you have to do is to ascertain whether the process, practice, and mode of pleading on the Revenue side of the Court do include proceedings by way of appeal on that side of that Court. I own that upon the best consideration which I can give to the matter I am of opinion that they do, not only from one's experience with respect to the practice of the Court, which has always been considered to include error and now appeal, but also upon the terms and out of the enactments of this Act itself. First of all, with regard to the experience of us all, with respect to practice, for of course the mode of pleading is out of the question, and I pass over process, because it has a technical meaning, such as has been put upon it in Comyn's Digest, title "Process." It relates to writs, either original or judicial writs of mesne process, or writs of execution; and I, therefore, do not place any reliance upon the use of the word "process;" but coming to "practice,"—"practice" is not a term of art. "Practice" is a word applying to all the proceedings by which a cause is brought to judgment and execution; and it is impossible to dispose of the subject of the practice of the Court without disposing of all the steps which may be taken before the judgment of the Court is carried into execution. And accordingly, looking at the question as a popular or as a professional one, if I take up any of the recognized books of practice of these Courts, I find that one of the heads in such a work will be the head of "error." Error will be considered, and now, since the recent alterations, Appeal will be considered; otherwise such a word would be, as it were, maimed of an arm or a leg. A member of the practice of the Court is the proceeding by which the judgment of the Court may be stayed, and the execution of the Court put off until it is determined whether the judgment pronounced by the Court is right or not. The understanding to be gathered from works with respect to practice is this, that a proceeding by way of error or appeal is part of the practice on the side of the Court in which the process originates. I think it necessarily must be so now, because we are all aware that as a rule no Court possesses any jurisdiction over the subjects of the Queen without the writ of the Queen. Neither this Court nor the Court of Exchequer has any power to proceed, unless upon the express authority of an Act of Parliament, without the process of the Queen; and accordingly the jurisdiction of Courts of Error, before which appeals were formerly brought exclusively, was initiated by the Queen's writ of error out of Chancery. That is abolished, and the only process under which the Court

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acts now, from the beginning to the end of any proceeding, is a process which is sued out in the Court of first instance, the execution or the stay of execution of which process is the object, of course, of every proceeding in error in any cause. In modern times, an appeal has been substituted, as being found more convenient than a writ of error. The appeal takes the place of the writ of error, and indeed more peculiarly appeal is a proceeding in the Court below, upon whichever side the process is commenced. There is no record in the Court of Appeal;—the appeal is a mere information, without any formal process to the Court which is substituted for the first Court, of what has taken place there, with a view to have a decision without being tampered by the technical forms which affected the proceeding in error. So much with respect to the meaning of the word "practice," as understood in the profession.

With respect to the Act itself, I apprehend that, as was suggested on Saturday by my brother Williams, this 26th section is framed with express reference to the amendments in the Law introduced by the Common Law Procedure Acts. As already pointed out, the first Common Law Procedure Act was founded upon the report of a Commission to improve the process, practice, and mode of pleading in the Courts of Common Law at Westminster. The recital of the Act is that that was its object, and its only object; and that Act includes proceedings in error. The second and third Common Law Procedure Acts followed. The second Act is headed, "An Act for the further amendment of "the process, practice, and mode of pleading in, and enlarging "the jurisdiction." I need hardly observe that that latter clause applied only to the attempt which was made, and made to a great extent unsuccessfully, by the framers of those two Statutes, to extend to the Common Law Courts an equitable jurisdiction, and that it had nothing whatsoever to do with the proceedings in error or appeal. In truth, appeal was not an extension of jurisdiction, but only the substitution of a more convenient mode of obtaining the opinion of a Superior Court. And unless the Legislature is to be considered as having stultified itself in the first Common Law Procedure Act, by reciting an improvement in the practice of the Courts, and then proceeding to make various enactments with respect to error, not only affecting the Courts of first instance, but affecting the Courts of Error also, and touching even the powers and jurisdiction of the House of Lords, I am at a loss to see why "practice" in the 26th section should not be construed to extend to the mode of taking the opinion of the Court of Error on appeal before the execution issues from the Court in which the proceedings commenced. And I apprehend that that is quite as much a part of the practice of the Court of first instance as is, in the case of these Revenue proceedings, the trial of the issues arising on a record out of the Court of Exchequer in the Court of Nisi Prius at the Assizes, which we all know is a Court whose jurisdiction is created in as different a manner, and is in itself in every way as distinct from

the Court at Westminster as is the Court of Exchequer Chamber, or the Court of Appeal.

It is said, however, that this construction is excluded by certain clauses of the Act; and it is said that it is excluded by the fact of the Legislature having given in certain cases a right of error and appeal, and having omitted the case in question, and by the supposed absurdity of the Legislature intending to give a right of appeal in a case which it has not expressly mentioned. I apprehend, with the greatest deference to those who are of that opinion (and nobody has better learnt how necessary and how just that deference is than myself), that that argument may be retorted with double force upon those who assert that the right of appeal in this particular case is excluded by a right of appeal being given in the cases mentioned in the Act. Because not only will this be found to be a case of appeal, *ejusdem generis*, but it will be found that the cases in which appeal is granted by the Legislature first of all are cases in which the special interfereuce of the Legislature was necessary; because under the 26th section such a power could not have been given; and, secondly, that at least one of those cases of appeal is a peculiar one, and belonging to the Revenue jurisdiction only. Now I may at once refer, in support of that suggestion, to the 15th section. That section gives an appeal in a case in which an appeal was never known before;—not even known in those Courts to which the Act of 1854 in terms applied, because it gave an appeal upon a rule. It is unnecessary that I should say more than that, or go into any discussion of the form of proceeding under which the Court of Exchequer has Revenue jurisdiction upon a rule. It is a summary process without a writ, and it is enough to say that it is a case in which no appeal had ever previously been allowed; and therefore an appeal is granted, and granted distinctly in a case which goes far beyond any that was contemplated in the Act of 1854. I rather collect from that that the Legislature thought that appeal was a remedy which should be extended and enlarged. With regard to the other cases in which an appeal might lie under the Common Law Procedure Act, the first of them is to be found provided for in the 22nd and 23rd of Victoria, chapter 10, where I observe that the Attorney General is included under the general expression of "the parties." That was an appeal upon a special case agreed to between the parties, including the Attorney General, on behalf of the Crown. In such a case no intervention of the Court was necessary. The Crown is sufficiently protected by the Attorney General's having the power of preventing such an appeal by refusing to give his consent to the special case upon which it might be brought. The 17th section is a very remarkable one, as it appears to me, because before that Statute, up to the Act of the 2nd and 3rd of the Queen, chapter 22, no cause out of the Exchequer could have been tried at Nisi Prius without a commission. That Act abolished a commission in all cases between subject and subject. This Act, by the 17th section, reduces the Crown to the same condition as the subject in that respect; and it allows

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the Justices of Assize a distinct Court from the Court of Exchequer to try Revenue cases without any commission. The 19th section is one which requires a remark. It is the section abolishing a writ of error; and then it goes on to enact that "the proceeding in error shall be a step in the cause, and shall be taken in manner and subject as to such terms and conditions as to giving bail or security as may be directed by any rule or order made by the Barons." Why? Because the provisions of the Common Law Procedure Act, following the Statute of Elizabeth, were not applicable to the case of the Attorney General; because it was thought, no doubt, an absurdity that the Attorney General should enter into a recognizance, or that any security should be given by him; and accordingly it was necessary that there should be rules by which the law applicable to parties should be modified; and that to me seems quite a sufficient reason why this provision as to the abolishing of a writ of error should be specially introduced into the Act. And, moreover, I think, with reference to the 27th section, that such a section as the 19th was necessary, because it enacts that "new or altered writs and forms of proceeding" shall be framed by the Barons, but it does not give the Barons a power which would include the abolishing of the Queen's writ of error. The introduction of the 19th section appears to me to be fully explained in that way.

Then comes the section with respect to a bill of exceptions; and that, of course, was necessary, because the right to a bill of exceptions is founded upon the Statute of Westminster the Second, and not upon the first or second Common Law Procedure Act, and therefore an express section was necessary. This being so explained, I apprehend that the introduction of such an enactment by the Legislature strongly fortifies the position which I take, because it shows that the Legislature intended to put the Crown in the same condition as the subject in every respect in which that course could be taken.

But now comes the question of an appeal upon a rule for a new trial, which may be without the leave of the Court when it is divided, and without the leave of the Attorney General. Why should that discretion be vested in the Barons of the Court of Exchequer, and why should it be for them to say that appeal should lie in such a case? I own that I see no difficulty in answering that question, because I conceive that the appeal upon a special case after the argument of a new trial is only a more convenient mode of raising a question which could have been raised upon a bill of exceptions. Am I right in saying that you could raise under a bill of exceptions the sort of question which is desired, so far as I can judge from the proceedings to be raised here? I am of opinion that you can. It is said ordinarily that you cannot except to non-direction; that is to say, to the Judge not having directed upon a particular point. That is so, ordinarily, no doubt, and if it were not so, a Judge could never select the point which he perceives to be the only real one in dispute, and leave that

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alone to the jury, disembarrassing their minds of what has become immaterial for them to consider, because it has either expressly or tacitly been admitted. Such was the ruling of the House of Lords in a case which is cited so frequently, the case of Anderson v. Fitzgerald (4 House of Lords, 484). But it would be quite a mistake to suppose that if a Judge, having omitted to state a proposition which ought to be stated in the affirmative or in the negative, states or omits to state a point of law to the jury, so as that they may be misled as to facts of the case, which it was material for them to consider, and counsel calls the attention of the Court to that omission, and the Judge declines to correct the impression which has been produced by the omission and by his silence upon the subject—it would be a mistake, I repeat, to say that a bill of exceptions may not be tendered. In order to tender a bill of exceptions upon an omission the counsel must call the attention of the Court to it, and it must be the omission of a direction in point of law which may induce the jury to look to facts which they ought to consider as irrelevant, or to omit from their minds facts which they ought to consider important. And such was the opinion of the Judges in the recent case of Macmahon against Leonard, 6 House of Lords, 996. Mr. Justice Wightman, in delivering the opinion of the Judges in that case in the House of Lords (page 996), so laid down the law, with the assent of all the Judges who were then present; and I repeat, therefore, that those points which may be taken at the trial by a bill of exceptions, if the exceptions are properly framed, may be taken, and none other that I know of, upon the argument of such an appeal. If the Statute with respect to bills of exceptions had directed, as we know it does in one part of the kingdom, that the exceptions should first be argued before the Court of first instance, and should afterwards go to the Exchequer Chamber, this would be nothing more than, in substance, changing a proceeding by bill of exceptions, which is full of expense and technicality, into a simpler and more beneficial proceeding by way of appeal against the ruling of the Court upon a point which might have been raised at Nisi Prius upon a bill of exceptions.

The Court of Exchequer seems to me, therefore, in making this rule, to have been authorized by the 26th section, and to have kept strictly within its provisions; and the rule appears to me to be a rule with regard to the practice of the Revenue side of the Court, and not exceeding the jurisdiction which the Legislature intended to confer upon the Court of Exchequer, to which exclusively are confided those complicated and unusual cases, proceedings *in rem*,—raising questions that would not arise between subject and subject in the other Courts. I think this appeal is competent, and that we ought to proceed.

Mr. Justice Crompton.

Mr. Justice Crompton.—The question before us in this case is, whether the Chief Baron and three Barons of the Court of Exchequer had authority, by a general rule made by them under the

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26th section of the Queen's Remembrancer's Act, to give to parties litigant on the Revenue side of the Exchequer an appeal against the decision of the Court upon a rule for a new trial upon matter of law arising at the trial. It was not contended on the part of the Crown that any such appeal existed independently of that Statute; nor was it, nor could it be pretended that such right of appeal was directly given to the parties by that Statute, which regulates proceedings in error, and gives in distinct and express terms the right of appeal in several cases where the Legislature thinks it ought to exist. The Attorney General was, therefore, obliged to iusist upon a supposed delegation to the Barons of the power of creating such appeal by virtue of the 26th section of the Act. No doubt the Legislature might, had it so pleased, have given such a power of creating such appeal to this Court, and ultimately to the House of Lords; but it certainly would be a new and unusual course of legislation, in creating a new statutory appeal. Parliament has frequently delegated powers of making rules as to pleading and practice, and has authorized persons interested in particular localities to adopt the provisions of particular Acts of Parliament; but, as far as I know, this is the first time that a power of creating an appeal has been entrusted, if it has been entrusted, to the Court from whose decision the appeal is to be; and the general rule that an appeal, the creature of a Statute, must be very distinctly and unequivocally given, seems to me to apply still more strongly to the supposed power of creating such appeal. I cannot think that the power of creating such an appeal is given to the Barons by the 26th section. In the earlier parts of the Act, provision is distinctly and expressly made for creating appeals in some cases, and for regulations as to the matters of error and appeal, where the Legislature thought that such appeals should be made, and that such regulations were desirable; and in giving such appeals, and making such regulations, and in introducing such provisions of the Procedure Acts, and in making them applicable to cases on the Revenue side of the Exchequer, they seem carefully to have abstained from giving the right of appeal from decisions of the Court on motion, although such right of appeal is given expressly by the Procedure Act of 1854 in civil cases in the same set of clauses from which they selected some for giving rights of appeal in other cases. The Legislature may possibly have thought it better not to give so much facility to appeals in cases for the breach of customs and excise laws as might operate as a temptation to parties to bring forward appeals, in many cases for the purpose of delay and vexation, especially when the Court peculiarly conversant with Revenue matters had decided upon them. They certainly appear to have abstained, probably upon some such ground, from inserting provisions for such an appeal where we should have expected them to be found, if so intended; and this makes me think it the less likely that they would delegate the power of creating such appeal to the Barons.

It was contended that the Legislature, by the use of the words

"process, practice, and mode of pleading" in the 26th section must be taken to include the right to appeal, as those words are used in the preamble and in other parts of the Procedure Acts, and that as the later Procedure Act contains provisions for appeals on motions, the words in question must be taken to have a statutory meaning, and to include therein such right to appeal, and that such right is either process, practice, or mode of pleading, when used in the subsequent Act. I agree, however, with Sir Hugh Cairns, that it would be a very unsafe construction to infer from the preamble or recital of a Statute that it contains all which the Statute refers to, and that the Statute contains nothing more than what may be said to be included in the recital or preamble. As observed by Sir Hugh Cairns, it may contain all that is in the recital and preamble, and something more, as a right to a new statutory appeal. It seems to me that the 26th section refers to process, practice, and mode of pleading in the ordinary sense of those words, and that they cannot fairly be construed as intended to include the right of appeal, especially in a Statute where various rights of appeal are given before by express words. The words following the first branch of the section give power "from time to time by "any such rule or order to extend, apply, or adapt any of the "provisions of the Procedure Acts, and any of the rules of plead-"ing and practice on the Plea side of the Court to the Re-"venue side of the Court"; but this general power is qualified by words plainly applicable to the whole of the preceding powers as to adapting the provisions of the Procedure Act. Those words are: "as may seem to them expedient for making the "process, practice, and mode of pleading on the Revenue side of "the said Court as nearly as may be, uniform with the process, "practice, and mode of pleading on the Plea side of such Court."

The whole section seems to me clearly intended to give powers to make rules respecting process, practice, and pleading. It is analogous to the provision in many cases for Courts to make rules as to their own process, practice, and pleading. It refers to the rules of pleading and practice, and, as I think, to the provisions of the Procedure Act, so far as relates to process, practice, and pleading. The words "from time to time" appear to apply to cases like those where the Courts are empowered to make rules for the purposes of pleadings, amendments, time for pleading, writs, processes, and the like, and not to be so applicable to the case of giving a new right of appeal,—which, I agree with the Attorney General, could hardly be intended to be given one day, and taken away or altered on another, as might well be the case with mere rules of practice or pleading, which might be found inconvenient and altered again.

Another argument urged upon us was, that as the bill of exceptions was given by the Act, the Appeal on Motion was only a new kind of practice and mode of obtaining the same result. I cannot think that the giving a bill of exceptions to correct a mistake made at the trial by a single Judge, who may by the Act in question be the Judge of another Court, is at all the same thing

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Mr. Justice Crompton.

as giving an appeal against the decision on motion of the Court particularly conversant with matters of Revenue; and though in many cases a question of law might be raised in both methods, they would be raised with very different incidents to the parties. The bill of exceptions which could formerly be used only on writ of error, and since the Procedure Acts can only be used on suggestion of error, is an expensive and troublesome remedy seldom resorted to, except on important and fitting occasions; and it may well be that the Legislature has given that remedy, and purposely abstained from encouraging appeals in the smaller matters of the breach of the Excise and Custom Laws, which so frequently come before the Court of Exchequer. There certainly has been some ground for complaining of the number of appeals which have been brought under the provisions of the Procedure Act from decisions upon motions in the Common Law Courts; and, from what passed in the Court below, there seems to have been some fear of the consequences of extending this provision to proceedings on the Revenue side. It is sufficient, in my mind, as to this argument, to say that the bill of exceptions and the new appeal from decisions on motions is not the same remedy; nor can the one, I think, be fairly treated as process or practice by which to carry out the other.

I think that the words process, practice, and pleading, in the 26th section, cannot, without great straining, be construed as delegating the power of creating a right to appeal. The right of appeal can hardly be process or pleading; and as to the word "practice," I cannot help thinking that there is a great difference between the machinery of the appeal and the right of appeal. The former might with less difficulty be called "practice," but I have great difficulty in seeing how the giving a right to appeal is "practice."

The power given to eight Judges to make pleading and practice rules in ordinary actions could never have been imagined to give any power of creating an appeal; and it seems to me, from the reference in the Queen's Remembrancer's Act, section 26, to those prior rules, and from the qualifications limiting the power of adopting the provisions of the former Acts to the purposes of practice, pleading, and process, and from the other reasons I have referred to, that I cannot say that the Legislature has, by the 26th section, delegated to the Barons any such power as that contended for.

I think, therefore, that there is no right to appeal from the decision on motions of the Court of Exchequer in cases on the Revenue side of that Court, and consequently that we have no jurisdiction to interfere with the decision of the Court of Exchequer in the present case.

I agree with my brothers Blackburn and Mellor that if we are wrong our error may be set right by the House of Lords, who, if they are bound by the rule of Court of the Barons, are directed by the same rule to give the judgment that we ought to have given.

JUDGMENT.

Mr. Justice Williams.

Mr. Justice Williams.—I am of opinion that we ought to hear this appeal; because I think the Barons of the Exchequer had power, under the Statute 22 and 23 Vict., chapter 21, section 26, to make the order, which they have made, extending to the Revenue side of their Court, the provisions contained in the 35th and 36th sections of the Common Law Procedure Act, 1854.

The 26th section of the former of these Statutes authorizes the Barons by their order "to extend and apply or adapt any of the "provisions of the Common Law Procedure Acts, &c., to the "Revenue side of the said Court, as may seem to them expedient "for making the process, practice, and mode of pleading on the "Revenue side of the said Court as nearly as may be uniform "with the process, practice, and mode of pleading on the Plea "side of such Court."

It cannot be controverted that if this section confers on the Barons a general power to extend such of the provisions of the Common Law Procedure Acts, as they think proper, to the Revenue side of the Court, all question ceases. But it is argued that the language of the section confines the extension to such provisions of the Common Law Procedure Acts as relate to proceedings in the Court of Exchequer itself, and does not allow of the application of such of those provisions as relate to appeals to the Exchequer Chamber and the House of Lords, which, it is said, are foreign to the Court of Exchequer, and are not part of its "process, practice, or mode of pleading."

But it should be observed that the proceedings in error, generally speaking, are not regulated by any rules of the Courts of Error themselves; but by the "*Regulæ Generales*" of the Superior Courts at Westminster out of which the proceedings in error come. And this appears to show that proceedings in Courts of Error by way of appeal may well be regarded as part of the practice of those Courts respectively. It may further be remarked that the phrase "process, practice, and mode of pleading" is a familiar phrase, which the Legislature appears to have purposely used as one of well known signification. It was, I believe, first employed when the Commissioners were appointed to inquire into the "process, practice, and pleading of the Superior "Courts of Law at Westminster;" and afterwards in the preamble of the Common Law Procedure Act, 1852; and again in the title of the Common Law Procedure Act, 1854; and lastly in the title and preamble of the Common Law Procedure Act, 1860. But in accomplishing the great work of rendering more simple and speedy "the process, practice, and mode of pleading in the "Superior Courts at Westminster," it was not thought to be going beyond that purpose to reform and simplify the "proceed-"ings in Courts of Error."

None of the wholesome enactments, however, contained in these Statutes extended to the Revenue side of the Court of Exchequer until the passing of the Statute, the 22nd and 23rd of Victoria, chapter 21, now in question. And looking at the

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clauses in this Statute which were introduced for that purpose, it appears to me plain that they were framed with reference to the anomalous character of suits and proceedings in that branch of the Court. Their nature is so peculiar that the Legislature appears to have deemed it inexpedient to enact generally that the Common Law Procedure Acts shall apply to the Revenue side as well as the Plea side. Accordingly, some of their reforms, which are unquestionably beneficial, are at once applied. For example, by section 9, the general power of amendment given by the 222nd section of the Common Law Procedure Act is expressly extended to the Revenue side. Again, by section 10, the improvements as to the stating of special cases, and bringing error thereon, are also expressly applied at once. Again, by sections 18, 19, and 20, certain other of the provisions of the Common Law Procedure Act, as to the propriety of the application of which no doubt could be entertained, are at once and absolutely extended to the Revenue side. But as to the rest, the Statute leaves it to the discretion of the Barons, as being best able to judge of the expediency, to extend to the Revenue side so many of the provisions of the Common Law Procedure Act as they think right, in order to carry into effect the declared purpose of uniformity.

It has been objected that if the Statute meant to give the right of appeal, it would have said so expressly; but this would be to deprive the Barons of the discretion which, in my opinion, the Statute meant to confer on them, as to adopting this provision of the Common Law Procedure Act. Nor should we, in hearing this appeal, violate the rule that an appeal never lies unless it is given by Statute; because it *is* so given if the Statute in question authorizes the Barons to extend the enactment which confers the right; and being of opinion, for the reasons I have given, that proceedings in error and by way of appeal are part of the practice of the Court below, within the meaning of that Statute, I think the Legislature confers the right of appeal in this case.

Lord Chief Justice Erle.

Chief Justice Erle.—Upon this motion to dismiss the appeal, the question has been, whether the Barons of the Exchequer had jurisdiction to order that the following provisions of the Common Law Procedure Act, 1854, should be applied to the Revenue side of the Court of Exchequer; namely, that an appeal, with its ordinary incidents, should lie to the Exchequer Chamber and the House of Lords, where a rule for a new trial on the ground of misdirection by a Judge has been discharged. In my opinion the answer to this question should be in the affirmative;—that there was jurisdiction, on the ground that the Queen's Remembrancer's Act, the 22nd and 23rd of Victoria, chapter 21, section 26, gave to them the power to make that order.

In support of this opinion, I proceeded to consider that Statute, together with the state of the law which led to its passing. And first I would premise that procedure in a suit includes the whole course of practice, from the issuing of the first process by which

the suitors are brought before the Court to the execution of the last process on the final judgment; and throughout the Common Law Procedure Acts and this Act "procedure" is used as equivalent to "process, practice, and mode of pleading." Procedure in civil suits in the Superior Courts of Common Law received memorable improvement by the Common Law Procedure Acts, 1852 and 1854. Those Acts are declared, in the preamble of the first and the title of the second, to be for the amendment of process, practice, and mode of pleading in the Superior Courts. Those Acts provide that each suit, from the issuing of the first to the execution of the last process, should be taken to be one entirety. They contain provisions for the practice to be followed in obtaining redress for erroneous judgments by appeal to the Exchequer Chamber and the House of Lords, the writ of error being abolished, and proceedings in error being declared to be steps in the cause by the Common Law Procedure Act, 1852, section 148. Appeal is very essential for maintaining the right administration of Law, and careful provisions are made to give the use and prevent the abuse of the right of appeal. According to those provisions the appeal is effected by the Act of the suitor in the Court of first instance, delivering a memorandum to the officer of the Court without writ or other authority, and the right to deliver that memorandum is vested in him in his capacity of suitor, derived from the first process in the suit. That memorandum, so delivered, if the rules of practice are complied with, compels the officer of the Court below to bring the record into this Court and into the House of Lords, and may compel each of those higher Courts to hear his appeal against the judgment entered on the roll of the Court below, so brought by that officer into the higher Courts; and he is to record thereon the judgment of those higher Courts, and then to take back that judgment to the Court below, as the judgment in that suit to be executed by that Court, according to the practice therof. The provisions are ample for the practical guidance of the suitor in carrying his appeal through each Court, and they are clear to show that each Court of Appeal has no other functions than to fix the time for hearing the case; neither Court can interfere with the record, or do any effective act but hear and determine on the judgment to be pronounced. The whole of these provisions in the Common Law Procedure Acts are constantly described as relating to "process, practice, and mode of pleading," and they extended to the Plea side of the Court of Exchequer, but not to the Revenue side of that Court. And this brings me to the passing of the Statute above mentioned, the 22nd and 23rd of Victoria, chapter 21, under which the Barons claimed to make this order. I assume that the procedure on the Revenue side of the Exchequer was adapted to usages now obsolete, and so was in need of being amended; also that the Legislature intended to adopt this amended procedure of the Common Law Procedure Acts, as being consonant to the interests of truth and justice, reserving no privileges to the Crown as a suitor against a subject inconsistent with those interests. I would also refer to the rule

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Lord Chief Justice Erle.

that the rights of the Crown cannot be taken away without clear words of enactment, as explaining the insertion of some of the sections in this Act.

But to come to the Statute itself. The preamble recites the expediency of making provision in relation to the procedure on the Revenue side of the Court; then several sections, adapting the spirit of the Common Law Procedure Acts to matters of Revenue, contain provisions suited to the intended change of procedure. Those which seem to me relevant to the matter now in hand are as follows: Section 9 gives full power to amend all defects of form. Section 10, to state a special case, and bring error thereon. Sections 12 and 13, in case of appeal to the Exchequer from the assessment of the Commissioners relating to Succession Duty, give power to *appeal* from the Exchequer to the two higher Courts. Section 15, in case of a suit for succession duty, enables the Court to refer the matter to a Master, and to take his report as a special case, and error to be brought thereon. Section 17 empowers the Judges of Assize to try issues on the Revenue side as on the Plea side. Section 19 makes proceedings in error to be a step in the cause, without writ of error, to be taken in manner as may be directed by any order made by the Barons under this or any other Act. Section 20 gives power to tender a Bill of Exceptions on trial of issues from the Revenue side; and section 21, to give costs for and against the Crown. We then come to section 26, which gives large powers for making orders. It contains two distinct clauses; by the first clause the Barons are empowered from time to time to make all such orders as to "process, practice, and mode of proceeding on the "Revenue side, and for the effectual execution of this Act, and "the intention and objects thereof, as may seem to them necessary "and proper;" and by the second clause, "also from time to time "by such order to extend, apply, or adapt any of the provisions "of the Common Law Procedure Act, 1852, and of the Com-"mon Law Procedure Act, 1854, and any of the rules of plead-"ing and practice on the Plea side of the Court, to the Revenue "side, as may seem expedient for making the process, practice, "and mode of pleading on the Revenue side as nearly as may be "uniform with the process, practice, and mode of pleading on the "Plea side of the Court." I have referred to several sections creating specific appeals. For all of these appeals, both to the Exchequer Chamber and to the House of Lords, the Barons must make order under section 26, when making orders as to process, practice, and mode of pleading on the Revenue side; for if they did not do so, the effectual execution of the Act would be prevented. Section 19, relating to proceedings in error, seems to me to refer expressly for the practice in those proceedings to the orders to be made by the Barons under section 26. It refers to orders to be made under this Act; and section 26 is the section which empowers them to make the required orders. If this view of the effect of the Statute be correct, it is certain that the power of the Barons to make orders as to the process, practice,

and mode of pleading on the Revenue side was not confined to the Court of Exchequer, but extended to the Courts of Error, into which suits should be brought from the Revenue side of the Court of Exchequer.

It may also be worth noting that under section 26 the Barons must make orders for the practice on the appeals under sections 10 and 12 above referred to, as the appeal is created by the name "appeal," and no specific procedure is created. The first clause of section 26 gives very ample powers; but the 2nd clause is that which is more immediately applicable to the order in question. It empowers the Barons, *inter alia*, to apply any of the provisions of the Common Law Procedure Act, 1854, to the Revenue side, as may seem expedient for making the procedure on the Revenue side as nearly as may be uniform with the procedure on the Plea side. The order in question applies section 35, which is one of the provisions of the Common Law Procedure Act of 1854, to the procedure on the Revenue side. The Barons are directed to make that procedure uniform with the procedure on the Plea side. Section 35 is part of the procedure which is in use on the Plea side; and the Barons, therefore, are not only empowered, but required, to make an order for applying it, if they are to make the procedure on the two sides uniform, and if they think it expedient, The order of the Barons seems to me, therefore, to be supported by the words of section 26, and to accord with the intention to be collected from the context.

The objections on which Sir Hugh Cairns relied to prove want of jurisdiction depend on the construction of section 26: and if the construction above stated is right, it follows that his objections fail. Against that construction he pressed two principal arguments, as I understood him; first, that the order which the Barons were empowered to make was intended to operate only on proceedings while in their own Court, and had no effect upon the Courts above; and secondly, that the said order, if valid, subjected suits to a ground of appeal which did not exist before. As to the first ground, I have already given my reasons for saying that procedure on the Revenue side includes not only proceedings in the Court of first instance, but also those in the sequel of Courts through which the same suit may be carried by the suitor, and that power was given to the Barons over the whole of the procedure. The Statute, in my opinion, delegated to them an authority to make orders; and all orders made within that authority have the same effect as the Statute. It may well be that the Legislature thought that the Barons of the Exchequer were best qualified to decide how far the collection of the revenue could be reconciled with the new rights proposed to be granted,—rights which might be subject to abuse by dishonost debtors sued by the Crown. But my reasons for dissenting from this argument have been sufficiently explained.

With regard to the second objection, that the order, if valid, would subject suits to a ground of appeal which did not exist

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before, my answer is a denial of the fact. In my opinion, the order of the Barons did not create any new ground of appeal; the order applies section 35 of the Act of 1854 to the Revenue side; and, thereby when a motion is made for a new trial on the ground that the Judge has not ruled according to law, that is, has misdirected, a party may have the decision on that motion reviewed in a Court of Appeal. Before 1854, in case of misdirection by a Judge, a party aggrieved might seek redress either by tendering a bill of exceptions, or by moving in banco for a new trial. Each remedy had its defects. The bill of exceptions, though a most salutary check against mistakes by Judges, was subject in practice to much expense, delay, complication, and other defects. The motion for a new trial had the defect of being final without appeal; and as the Court, according to usage, accepted the statement made by the Judge of the course he had taken at the trial, the suitor was often dissatisfied with the result. Section 35 introduced a salutary amendment of the practice, which was to be at the suitor's option in case of misdirection, by enabling him to appeal from the decision of the Court of first instance upon a motion for misdirection. By this amendment a bill of exceptions can only be needed when the suitor has a distrust of the Judge or of his Court. If there is mutual confidence, the point can be reserved subject to appeal, and the suitor has facility for obtaining the judgment of each of the three Courts in their order. But on a bill of exceptions, the opinion of the Court in which the action is brought is not taken, and the proceeding is encumbered with the difficulties before referred to.

The 22nd and 23rd of Victoria enabled the party to tender a bill of exceptions in suits on the Revenue side; it thereby enabled him to bring any complaint of misdirection before a Court of Appeal,—the ground of appeal being misdirection, but the practice to be followed being bill of exceptions. The order in question left the ground of appeal precisely the same as it would have been under a bill of exceptions, but altered the practice to be followed in seeking redress. If the party, instead of tendering a bill of exceptions, moves for a new trial, he may bring the question of misdirection before the Court of Appeal under the order of the Barons. But it is still the same misdirection which might have been the subject of exception. The course for redress under a bill of exceptions would have been more circuitous; but still misdirection, and nothing but the misdirection which might have been an exception can be the ground of appeal under the order in question. Thus it seems to me to be true that the order relates only to the practice to be followed in appealing on account of misdirection, and leaves the rights of the parties under the law in respect of misdirection as they were before, and in this sense did not create a new ground of appeal.

For these reasons, I am of opinion that the order in question is valid, and that this Court has jurisdiction to hear and determine this appeal.

JUDGMENT.

Lord Chief Justice Cockburn.

Lord Chief Justice.—After the best consideration I can give to this case, the only conclusion at which I can arrive is that we have no jurisdiction to entertain this appeal. The question depends upon whether by the 26th section of the 22nd and 23rd Victoria, chapter 21, "An Act to regulate the office of Queen's "Remembrancer, and to amend the practice and procedure on the "Revenue side of the Court of Exchequer," power is given to the latter Court to establish the proceeding by appeal on motions for new trial in revenue causes, and to give an appellate jurisdiction to the Court of Exchequer Chamber. The section first provides that "it shall be lawful for the Lord Chief Baron and two "or more Barons of the Court of Exchequer from time to time "to make all such rules and orders as to the process, prac-"tice, and mode of pleading on the Revenue side of the Court, "and as to the allowance of costs, and for the effectual execution "of the Act, and the intention and objects thereof, as may seem "to them necessary and proper." It is admitted that this part of the section relates only to the procedure in Revenue causes so long as a cause is pending in the Court of Exchequer itself. But the section goes on to give power to the Barons "from time to time by "any rule or order to extend, apply, or adapt any of the provisions "of the Common Law Procedure Act, 1852, and the Common "Law Procedure Act, 1854, and any of the rules of pleading and "practice on the Plea side of the said Court to the Revenue side "of the said Court, as may seem to them expedient for making "the process, practice, and mode of pleading on the Revenue side "of the said Court as nearly as may be uniform with the "process, practice, and mode of pleading on the Plea side of the "said Courts." The question is, whether the power of adapting the provisions of the Common Law Procedure Acts for the purpose of assimilating the procedure on the Revenue side to that on the Plea side of the Court enables the Court of Exchequer to create for the first time an appellate jurisdiction in this Court in causes relating to the Revenue?

It is, no doubt, true that the proceeding by appeal on motions for new trial is one of the provisions of the Common Law Procedure Act of 1854. But I cannot bring myself to think that, when the language of the 26th section of the 22nd and 23rd of Victoria, chapter 21, is looked to, the application of this provision is within the scope of the authority conferred on the Barons of the Exchequer. Still less, when the other enactments of this Statute are taken into account, does it seem to me possible to adopt that view.

It is admitted that the words, "process, practice, and mode of "pleading on the Revenue side of the Court," occurring in the first branch of the 26th section, apply only to the procedure of the Court itself, properly so called. It is not contended, in support of the jurisdiction, that under the power conferred by the first branch of the section, the Court would have had power to create a proceeding by appeal. Why, then, should the words be read differently when occurring in the second branch of the section? Besides which, independently of this argument, it appears to me that the term

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Lord Chief Justice Cockburn.

"process, practice, and mode of pleading on the Revenue side of the Court" must be taken to have reference to the procedure of the Court while the cause is still pending within it, and cannot be taken, without a very forced construction of the language, to apply to the creating of an appellate jurisdiction, or to the procedure to be adopted when the cause has quitted the sphere and precincts of the inferior Court, and has passed into the jurisdiction of the appellate tribunal. It is true the process out of which the appeal emanates and springs is that of the Court below, as also that the record after the appeal has been disposed of returns to the Court out of which it came, in order that effect may there be given to the judgment. It is also true that in Acts of Parliament relating to the procedure of the Superior Courts of Common Law, the term "process, practice, "and mode of pleading" is applied to the procedure of Courts of Error and Appeal. But who, on an appeal in a civil suit, ever thought of speaking of the practice of the Court of Exchequer Chamber as the practice of either of the three Courts from which to its superior jurisdiction an appeal lies? In the Court of Exchequer, on a rule for a new trial, a plurality of counsel may be heard on the same side. In the Court of Appeal we hear but one on each side. This is because our proceedings are here regulated by the practice of this Court, and not by that of the Court of Exchequer. Again, the time within which, according to the Common Law Procedure Acts, the appeal must be brought, the form in which it shall be brought before the Court, the awarding of process (as to which power is expressly given to the Court of Appeal), all these are matters of practice, as to which, if special statutory enactments had not been made, the Court of Appeal must have made rules to regulate its own proceedings. How can these matters be said to appertain to the procedure on the Revenue side of the Court of Exchequer? Yet these provisions as to the jurisdiction and procedure of this Court, the Court of Exchequer has taken upon itself to prescribe and settle as though it formed part of its own. The fundamental fallacy of the whole proceeding appears to me to consist in supposing that, because a cause commences on the Revenue side of the Court of Exchequer, and in a certain sense may be said to be a cause in that Court, the practice and procedure of this Court is therefore to be a part of the practice and procedure of the Court of Exchequer. The Revenue side of the Court of Exchequer is a separate and distinct Court; this Court of Exchequer Chamber is another. The practice and procedure of the one is not that of the other; and a power to amend the practice and procedure of the one is not, as it seems to me, a power to amend that of the other.

But can it be supposed, in the absence of clear legislative enactment, that Parliament intended to confer on the Court of Exchequer the power of creating or withholding an appeal in matters of revenue at its pleasure and discretion? When, in the history of juridical legislation, was such a thing ever heard of as the Legislature leaving it to a tribunal to decide whether its authority should be subject to revision and correction on appeal? No doubt, in order to prevent vexatious and frivolous appeals, the

right to appeal may be made conditional on the permission of the Court: but no one ever heard of its being left to a Court to decide whether its authority should be generally subject to an appellate jurisdiction or not. Statutory power has been given to Courts to make rules and regulations as to procedure, but never to determine whether there should be a Superior Appellate Court. Is it conceivable that Parliament would, in a matter of so much importance, and so eminently fitted for the determination of the Legislature, have delegated its functions to a Court of Law? It does not appear to me enough to say that by this Act the proceeding by bill of exceptions is allowed in Revenue cases, and therefore the Legislature might well intend to give power to the Court of Exchequer to superadd the proceeding by way of appeal. The obvious answer to such an argument is that, had such been the case, nothing would have been more easy than for Parliament so to enact. A few short lines, and the matter would have been set at rest. But, besides this, there are material distinctions between the proceeding by bill of exceptions and that by appeal. The proceeding by appeal, consisting, as it does, of three stages, instead of two, is more likely to be resorted to for the purpose of delay. The case on which the appeal is to be brought must be stated between the parties, or, in case of disagreement, must be settled by the Court or a Judge. It may not have been deemed advisable to place the Crown in this position. I am warranted in thinking that the adoption of this mode of proceeding in Revenue cases was deemed of doubtful expediency, from the fact that, though the Act of the 22nd and 23rd of Victoria, chapter 21, passed as far back as 1859, it was not till November last, that, is, after an interval of four years, that the Court of Exchequer, in consequence of the difficulty which arose as to settling the bill of exceptions in this case, had recourse to this 26th section, and made the rule of the 4th November 1863, in order to get rid of the embarrassment in which it found itself placed. It may be that, from a doubt of the propriety of extending the right of appeal to Revenue causes, the Legislature may purposely have stopped short of introducing an appeal clause into the Act of 1859, and may have contented itself with affording a remedy by bill of exceptions, as being of a more formal character, and less likely to be resorted to, except on very substantial grounds, and as avoiding the inconvenience of making the Crown a party to the special case to be stated in the case of appeal.

This view of the case becomes materially confirmed when it is observed how much of the provisions of the Common Law Procedure Acts in relation to proceedings on error has been introduced by specific enactment into the Statute in question. In the 9th, 10th, 18th, and 19th sections we have the provisions of those Acts relating to error applied to Revenue causes. It follows that either Parliament did not consider the adoption of these provisions as within the competency of the Court of Exchequer within the 26th section, or did not think proper to leave legislation on such a matter to the Court

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Lord Chief Justice Cockburn.

instead of providing it by Act of Parliament. Why then should a different course have been pursued in the perfectly analogous case of proceeding by appeal? Again, in the 20th section we have a provision for the right to a bill of exceptions. If the Legislature had intended to give the proceeding by appeal as well, why should it have stopped short of saying so? Still more striking are the provisions of the 12th and 13th sections, by which, in cases of appeal from the assessments of the Commissioners of Inland Revenue to the Court of Exchequer under the Succession Duty Act (proceedings clearly on the Revenue side of the Court), an appeal is given, in the very terms of the Common Law Procedure Act, to the Court of Error in the Exchequer Chamber, and from this Court to the House of Lords. Can it be supposed that if the Legislature had intended to extend the right to appeal further, it would have confined its specific application to this particular instance? According to the well known rule of construction, must not the express enactment in the particular case be taken to negative the intention to extend the provision generally? If, indeed, there were no provisions of the Common Law Procedure Acts which were applicable to assimilating the procedure of the two sides of the Court of Exchequer, except the provision as to appeal, I should feel greater difficulty as to the construction of the 26th section. But there are several most valuable provisions which would fall plainly within the procedure of the Court in my sense of the term. Among these may be enumerated the provisions as to evidence, as to discovery and inspection, and as to trial,—provisions which have had the effect of improving the administration of justice in the Courts of Law in a very eminent degree. To the adoption of these and similar provisions of the Common Law Procedure Acts the power of the Court of Exchequer, in my opinion, alone extends. To push it further would be, I think, to make Parliament say what it has not said, and do what it has not done—to legislate, in short, instead of expounding the Statute, which alone is within our province.

I regret to be obliged to come to this conclusion; partly because the proceeding by bill of exception appears to have been given up on the belief that this proceeding could be adopted; still more because, if the view I have taken be correct, the opportunity will be lost of settling the law on the very important question of the construction of the Act of the 59th of George 3rd, chapter 69, as to the equipment of ships for the service of belligerents. We should, however, be altogether departing from the principles on which, in the discharge of our judicial functions, it is our solemn duty to act, if we allowed ourselves to be influenced by considerations such as these. We must interpret the Act of Parliament, on which alone the present question depends, as we would do any other Statute, and as though the discussion and decision of a great question of national importance were not depending on our judgment on this preliminary objection. I cannot, however, but observe, in conclusion, that

JUDGMENT.

Lord Chief Justice Cockburn.

n all probability we shall neither prejudice the parties, nor delay the ultimate decision of this great question, by dismissing this appeal. Whatever might have been our decision on the main question, had we proceeded to hear this appeal, this case would no doubt have been taken to the House of Lords. Doubtless such will be the case now; and if the highest appellate tribunal should hold the decision of this Court on the question of jurisdiction to be erroneous, the case will be heard there upon its merits, just as, no doubt, it would have been had we heard this appeal out, and decided the main question involved in it. It is satisfactory, therefore, to think that no injury or delay will be occasioned by dismissing this appeal in the present stage, even should we be wrong. I concur with those members of the Court who think that, according to the true construction of the 26th section, we have no jurisdiction to entertain this appeal, and that our only course is to dismiss it.

The Court then made the following Rule:—

IN THE EXCHEQUER CHAMBER.

Monday, the 8th day of February 1864.

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL - *Informant,*

AND

HERMANN JAMES SILLEM, and others, claiming the "Alexandra" - - - } *Defendants;*

On a Case stated by way of Appeal from the Court of Exchequer.

Upon hearing, on the 6th day of February instant, Sir Hugh M'Calmont Cairns, Knight, and upon hearing Sir Roundell Palmer, Knight, Her Majesty's Attorney-General, on behalf of the Crown, and upon reading the said Case, the Court postponed its decision to this day. Now it is ordered by the said Court of Exchequer Chamber, That the said Appeal be and the same is hereby dismissed.

W. H. WALTON, Q. R.

APPENDIX.

RULES MADE BY COURT OF EXCHEQUER, DATED 4TH NOVEMBER 1863, APPLYING THE COMMON LAW PROCEDURE ACTS TO THE REVENUE SIDE OF THAT COURT.

COURT OF EXCHEQUER.—REVENUE SIDE.

Rules made by Court of Exchequer applying Common Law Procedure Acts to Revenue Side of that Court.

In pursuance of the provisions contained in the 26th section of the 22 & 23 Vict. cap. 21, intituled An Act to regulate the Office of Queen's Remembrancer, and to amend the practice and procedure on the Revenue side of the Court of Exchequer, "It is "ordered that the following provisions of the Common Law Pro- "cedure Act, 1854, be extended, applied, and adapted to the "Revenue side of the Court of Exchequer; and also that the "following rules as to giving bail in cases of appeal shall be in "force on the Revenue side of the Court of Exchequer:—

If rule nisi refused party may appeal.

1. "In all cases of rules to enter a verdict on nonsuit upon a point reserved at the trial, if the rule to show cause be refused, or granted and then discharged or made absolute, the party decided against may appeal.

Appeal upon rule discharged or absolute.

2. "In all cases of motions for a new trial upon the ground that the Judge has not ruled according to law, if the rule to show cause be refused, or if granted be then discharged or made absolute, the party decided against may appeal, provided any one of the Judges dissent from the rule being refused, or when granted being discharged or made absolute, as the case may be, or provided the Court in its discretion think fit that an appeal should be allowed, provided that where the application for a new trial is upon matter of discretion only as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed.

Courts of Error to be Courts of Appeal.

3. "The Court of Error, the Exchequer Chamber, and the House of Lords shall be Courts of Appeal for this purpose.

Notice of appeal.

4. "No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney and to the Queen's Remembrancer within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge.

Form of appeal.

5. "The appeal herein-before mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled

Rules made by Court of Exchequer applying Common Law Procedure Acts to Revenue Side of that Court.

by the Court or a Judge of the Court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to as may be necessary to raise the question for the decision of the Court of Appeal.

Rule nisi granted on appeal; how disposed of.

6. "When the appeal is from the refusal of the Court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal.

Judgment Court of Appeal.

7. "The Court of Appeal shall give such judgment as ought to have been given in the Court below, and all such further proceeding may be taken thereupon as if the judgment had been given by the Court in which the record originated.

Powers of Court of Appeal as to costs and otherwise.

8. "The Court of Appeal shall have power to adjudge payment of costs, and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process, and otherwise.

Error upon award of trial *de novo*.

9. "Upon an award of a trial *de novo* by the Court, or by the Court of Error upon matter appearing upon record, error may at once be brought; and if the judgment in such or any other case be affirmed in error, it shall be lawful for the Court of Error to adjudge costs to the defendant in error.

Payment of costs upon new trial on matter of fact.

10. "When a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event unless the Court shall otherwise order.

Affidavits on new matter.

11. "Upon motions founded upon affidavits, it shall be lawful for either party, with leave of the Court or a Judge, to make affidavits in answer to the affidavits of the opposite party upon new matter arising out of such affidavits, subject to all such rules as shall hereafter be made respecting such affidavits.

Bail.

12. "Notice of appeal shall be a stay of execution, provided that within eight days after the decision complained of, or before execution delivered to the sheriff, bail to pay the sum recovered and costs, or to pay costs when adjudged, be given in like manner and to the same amount as bail in error is required to be given under the rules of this Court, made on the 22nd day of June 1860, or as near thereto as may be applicable, provided that such bail shall not be necessary to stay execution in cases where the appellant is the Crown, the Attorney General on behalf of the Crown, or the Prince of Wales, or the Duke of Cornwall for the time being.

"The foregoing rules shall come into operation and take effect forthwith, and apply to every cause, matter, and proceeding now pending.

"FRED. POLLOCK.
"G. BRAMWELL.
"W. F. CHANNELL.
"G. PIGOTT.

"Dated the 4th day of November,
"in the year of our Lord 1863."

Extracts from the "Regulæ Generales" on the Revenue Side of the Court of Exchequer, dated 22d June 1860 (referred to in the Argument.)

Extracts from "Regulæ Generales" on the Revenue Side of Court of Exchequer.

In pursuance of the provisions contained in the 26th section of the 22 & 23 Victoria, chapter 21, intituled "An Act to regulate "the office of Queen's Remembrancer, and to amend the "practice and procedure on the Revenue side of the Court "of Exchequer," it is ordered that the following rules in respect of the matters hereafter mentioned shall be in force on the Revenue Side of the Court of Exchequer:—

Jury Process, Juries, and View.

(*Vide Argument, page* 50.)

Rule 75. That sections 104 to 115, both inclusive, of the Common Law Procedure Act, 1852, together with the rules 44 to 49, both inclusive, of Hilary Term, 1853, where applicable, shall extend and be adapted and applied to suits on the Revenue side of the Court.

Proceedings in Error.

(*Vide Argument, pages* 20 *and* 39.)

Rule 97. Either party alleging error in *law* may deliver to the Queen's Remembrancer a memorandum in writing, in the form contained in the schedule to these rules annexed, or to the like effect, entitled "In the Exchequer and suit," and signed by the party or his attorney, alleging that there is error in law in the record and proceedings, whereupon the Queen's Remembrancer shall file such memorandum, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note, together with a statement of the grounds of error intended to be argued, may be served on the solicitor of the department or attorney in the cause, as the case may be. Proceedings in error in law shall be deemed a supersedeas of execution from the time of the service of the copy of such note, together with the statement of the grounds of error intended to be argued, until default in putting in bail or an affirmance of the judgment, or discontinuance of the proceedings in error, or until the proceedings in error shall be otherwise disposed of without a reversal of the judgment; provided always, that if the grounds of error shall appear to be frivolous, the Court or a Judge, upon summons, may order execution to issue.

Rule 98. Upon any judgment hereafter to be given for the Crown on the Revenue side of the Court in any suit, including intrusion, except on special verdict, special case, or bill of exceptions, execution shall not be stayed or delayed by proceedings in rror or supersedeas thereupon, without the special order of the

Extracts from "Regulæ Generales" on the Revenue Side of Court of Exchequer.

Court or a Judge, or consent of Attorney General, unless the person in whose name such proceedings in error be brought be bound with two, or, by leave of the Court or a Judge, more than two, sufficient sureties, shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto Her Majesty, Her heirs or successors, by recognizance of bail, to be acknowledged in this Court, in double the sum adjudged to be recovered by the said judgment (except in case of a penalty, and in case of a penalty in double the sum really due, and double the costs, and in cases of intrusion double the yearly value of the properiy and double the costs recovered by the judgment), to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error be discontinued by the plaintiff therein), all and singular the sum or sums of money and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be also awarded for the delaying of execution; provided always, that the Court or a Judge may direct any other form of security to be given, and to such amount as may seem to the Court or a Judge sufficient, or may order money to be paid into Court in such manner and to such amount as may be deemed sufficient.

Rule 99. The assignment of and joinder in error in law shall not be necessary or used, and instead thereof a suggestion to the effect that error is alleged by the one party and denied by the other, may be entered on the judgment roll, in the form contained in the schedule to these rules annexed, or to the like effect.

Rule 100. The roll shall be made up and the suggestion last aforesaid entered by the plaintiff in error within 10 days after the service of the note of the receipt of the memorandum alleging error, or within such other time as the Court or a Judge may order; and, in default of such suggestion, the defendant in error shall be at liberty to sign judgment of non pros.

Rule 101. The several provisions contained in the 154th, 155th, 156th, and 157th sections of the Common Law Procedure Act, 1852, where applicable, shall extend and be applied in like cases on the Revenue side of the Court.

Rule 102. Either party alleging error in *fact* may deliver to the Queen's Remembrancer a memorandum in writing, in the form contained in the schedule to these rules annexed, or to the like effect, intituled "In the Exchequer and suit," and signed by the party or his attorney, alleging that there is error in fact in the proceedings, together with an affidavit of the matter of fact in which the alleged error consists; whereupon the Queen's Remembrancer shall file such memorandum and affidavit, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note and affidavit may be served on the opposite party or his attorney; and such service shall have the same effect, and the same proceedings may be had thereafter as heretofore had after the service of the rule for allowance of a writ of error in fact.

Extracts from "Regulæ Generales" on the Revenue Side of Court of Exchequer.

Rule 103. The several enactments and provisoes contained in the Common Law Procedure Act, 1852, sections 159 to 166, both inclusive, shall, so far as the same are applicable, extend and be applied to like proceedings in error on the Revenue side of the Court.

Rule 104. The sureties in cases of bail in error are to be approved of by the solicitor of the department, in like manner as on a capias, but if the bail piece cannot be completed in four days, as mentioned in rule 98, further time may be applied for to a Judge.

Rule 105. After suggestion in error has been entered on the roll, either party may set the cause down with the Queen's Remembrancer four clear days before the day appointed for arguing errors from the Exchequer; and four clear days before such day of argument the plaintiff in error must deliver paper books to the Judges of the Court of Queen's Bench, and the defendant in error must deliver paper books to the Judges of the Court of Common Pleas. Whoever sets down the cause must give immediate notice to the other party that he has done so.

22° & 23° VICTORIÆ, CAP. 21.

Queen's Remembrancer's Act.

AN ACT to regulate the Office of Queen's Remembrancer, and to amend the Practice and Procedure on the Revenue Side of the Court of Exchequer.—[13th August 1859.]

(*Sections referred to in the Argument and Judgment.*)

Sect. 22 of 15 & 16 Vict. c. 76. extended to suits, &c. in Exchequer.

9. Section 222 of the "Common Law Procedure Act, 1852," for the amendment of defects and errors in any proceeding in civil causes, and concerning the costs and terms of such amendment, shall extend to all suits and proceedings on the Revenue side of the Court of Exchequer.

Special case may be stated by consent of parties and order of a Judge.

10. In any suit or proceeding on the Revenue side of the Court of Exchequer, the parties may, at any time before judgment, by consent, and order of a Judge, state any question or questions of law in a special case for the opinion of the Court, without pleadings, and upon judgment thereon error may be brought as on a judgment on a special verdict, unless the parties agree to the contrary, and the proceedings for bringing a special case before the Court of Error shall, as nearly as may be, be the same as in the case of a special verdict, and the Court of Error shall either affirm the judgment or give the same judgment as ought to have been given in the Court in which it was originally decided, the said Court of Error being required to draw any inferences of fact from the facts stated in such special case, which the Court below ought to have drawn.

Costs to follow event unless otherwise agreed.

11. In case no agreement shall be entered into as to the costs of such special case and proceedings, the costs shall follow the event, and be recovered by the successful party.

Queen's Remembrancer's Act.

Appeal from assessments of succession duty may be carried to a superior Court.

12. In cases of appeal from the assessment of the Commissioners of Inland Revenue to the Court of Exchequer, made under the provisions of the Succession Duty Act, 1853, the party decided against may appeal from the decision of the Court upon a case to be stated by the parties, or, if they differ, to be settled by the Court, or a Judge thereof, or any officer to whom the Court may think proper to refer the same; and the Court of Appeal shall give such judgment as ought to have been given by the Court of Exchequer, and shall have power to adjudge the payment of Costs.

Courts of appeal.

13. Such appeal as aforesaid shall be made to the Court of Error in the Exchequer Chamber, and the decision of the said Court of Error shall be subject to appeal to the House of Lords.

Notice of appeal to be given.

14. No such appeal shall be allowed under this Act unless notice thereof be given in writing to the opposite party or attorney, and to the proper officer of the Court, within four days after the decision complained of, or such further time as may be allowed by the Court or Judge.

In summary proceedings for legacy or succession duty parties may appeal.

15. In any proceeding in the Court of Exchequer by writ of summons under the Succession Duty Act, 1853, or by rule under any of the Legacy Duty Acts, the Court may refer the matter to the proper officer to report thereon, and may, if they deem it expedient, order the facts contained in such report to be stated in the form of a special case for the opinion of the Court, and may give such directions as to the mode of settling the case, and the matters to be contained therein, and for the production of such documents, and may direct any issue or issues of fact to be tried by a jury, as they may think proper, and the Court may proceed to give judgment on such case, and for any amount of duty the Court are of opinion may be due to the Crown, and for costs, in like manner as on a verdict on information, and on such judgment error may be brought and judgment given as on a special case stated by consent.

Powers of 1 W. 4. c. 22, &c., as to examination of witnesses, and of sections 46th, 47th, 48th, and 49th of 15 & 16 Vict. c. 76. extended to revenue proceedings.

16. All the powers, authorities, and provisions contained in an Act passed in the first year of the reign of King William the Fourth, intituled "An Act to enable Courts of Law to order the "Examination of Witnesses upon Interrogatories," and of the Act of the thirteenth year of King George the Third, recited therein, as to the examination of witnesses within and out of the jurisdiction of the Superior Courts of Common Law at Westminster, and as to the attendance of witnesses, production of documents, costs thereof, and other matters relating to such examinations, and all the powers, authorities, and provisions contained in the forty-sixth, forty-seventh, forty-eighth, and forty-ninth sections of the "Common "Law Procedure Act, 1854," are hereby extended to all suits and proceedings on the Revenue side of the said Court of Exchequer; and if upon any examination under this enactment any person wilfully and corruptly give any false evidence, he shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence in the county where such

Persons giving false evidence guilty of perjury.

evidence is given, or in the county of Middlesex if the evidence be given out of England. Queen's Remembrancer's Act.

17. From and after the passing of this Act it shall be lawful for all Justices of Assize, and they are hereby authorized and empowered, on their respective circuits to try suits and proceedings pending on the Revenue side of the Court of Exchequer, and to proceed thereon in like manner as they can or may do in respect of causes pending on the Plea side of the said Court, and it shall not be necessary hereafter to issue any commission from the Revenue side of the said Court for that purpose. Revenue causes may be tried without a commission.

18. No judgment in any cause on the Revenue side of the Exchequer shall be reversed or avoided for any error or defect therein unless error be commenced or brought and prosecuted with effect within six years after such judgment signed or entered of record: provided that if the party entitled to bring error be at the time of such title accrued within the age of twenty-one years, feme covert, non compos mentis, or beyond the seas, the Court or a Judge may allow error to be brought at any other time. Error to be brought within six years. Proviso as to disabilities.

19. A writ of error shall not be necessary or used in any suit or proceeding in error on the Revenue side of the Court of Exchequer, and the proceeding to error shall be a step in the cause, and shall be taken in manner and subject as to such terms and conditions as to giving bail or security as may be directed by any rule or order made by the Barons under this or any other Act or Acts of Parliament authorizing the same; provided that nothing herein contained shall invalidate any proceedings already taken or to be taken by reason of any writ of error issued before the commencement of this Act, or before such rules and orders come into effect. Writ of error abolished.

20. Either party may tender a bill of exceptions on the trial of any issues arising on the Revenue side of the Court, and the like proceedings may be had and taken thereon as in such cases between subject and subject. Bill of exceptions.

21. The costs of all suits, informations, and other proceedings, and of any interlocutory matter or proceeding on the Revenue side of the Court of Exchequer, whether in law or equity, may be adjudged, decreed, or ordered by the Court or a Judge between the Crown and the subject on the same principles as such costs are now allowed between subject and subject, so far as such principles may be applicable, subject to such rules and orders as to the allowance of such costs as may be made by the Barons under this or any other Act of Parliament authorizing the same; and it shall be lawful for the Commissioners of Her Majesty's Treasury, and they are hereby required to pay costs directed to be paid by the Crown out of any monies which may hereafter be voted by Parliament for that purpose. Costs.

26. It shall be lawful for the Lord Chief Baron and two or more Barons of the Court of Exchequer from time to time to make all such rules and orders as to the process, practice, and mode of pleading on the Revenue side of the Court, and as to the allowance of costs, and for the effectual execution of this Act, and the Rules may be made by the Barons as to the process, practice, and pleading in Revenue.

Queen's Remembrancer's Act.

intention and objects thereof, as may seem to them necessary and proper; and also from time to time by any such rule or order to extend, apply, or adapt any of the provisions of the "Common "Law Procedure Act, 1852," and the "Common Law Procedure "Act, 1854," and any of the rules of pleading and practice on the Plea side of the said Court to the Revenue side of the said Court, as may seem to them expedient for making the process, practice, and mode of pleading on the Revenue side of the said Court as nearly as may be uniform with the process, practice, and mode of pleading on the Plea side of such Court.

New forms of writs and proceedings may be made.

27. Such new or altered writs and forms of proceedings and scales of costs for the Revenue side of the said Court may be issued, altered, taken, and acted on as the said Lord Chief Baron and Barons shall from time to time think fit to order, and all such writs and proceedings shall be acted on and enforced in such and the same manner as the writs and proceedings on the Revenue side of the said Court are now acted on and enforced, or as near thereto as the circumstances of the case will admit; and any existing form of writ or proceeding the form of which shall be in any manner altered in pursuance of this Act shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied under the powers of this Act.

15° & 16° VICTORIÆ, CAP. 76.—COMMON LAW PROCEDURE ACT, 1852.

Extracts from Common Law Procedure Act, 1852.

AN ACT to amend the Process, Practice, and Mode of Pleading in the Superior Courts of Common Law at Westminster, and in the Superior Courts of the Counties Palatine of Lancaster and Durham.

(*Sections referred to in the Argument and Judgment.*)

Error.

And with respect to proceedings in error, be it enacted as follows:

Error to be brought within six years.

146. No judgment in any cause shall be reversed or avoided for any error or defect therein, unless error be commenced, or brought and prosecuted with effect, within six years after such judgment signed or entered of record.

Proviso for disabilities.

147. If any person that is or shall be entitled to bring error as aforesaid is or shall be, at the time of such title accrued, within the age of twenty-one years, feme covert, non compos mentis, or beyond the seas, then such person shall be at liberty to bring error as aforesaid, so as such person commences or brings and prosecutes the same with effect within six years after coming to or being of full age, discovert, of sound memory, or return from beyond the seas; and if the opposite party shall at the time of the judgment signed or entered of record be beyond the seas, then error may be brought, provided the proceedings be commenced and prosecuted

with effect within six years after the return of such party from beyond seas.

148. A writ of error shall not be necessary or used in any cause, and the proceeding to error shall be a step in the cause, and shall be taken in manner herein-after mentioned; but nothing in this Act contained shall invalidate any proceedings already taken or to be taken by reason of any writ of error issued before the commencement of this Act.

Writ of error abolished.

154. In case error be brought upon a judgment given against several persons, and one or some only shall proceed in error, the memorandum alleging error, and the note of the receipt of such memorandum, shall state the names of the persons by whom the proceedings are taken; and in case the other persons against whom judgment has been given decline to join in the proceedings in error, the same may be continued, and the suggestion last aforesaid entered, stating the persons by whom the proceedings are brought, without any summons and severance, or if such other persons elect to join, then the suggestion shall state them to be, and they shall be deemed as plaintiffs in error, although not mentioned as such in the previous proceedings.

Error brought by one of several persons against whom judgment has been given.

155. Upon such suggestion of error alleged and denied being entered, the cause may be set down for argument in the Court of Error in the manner heretofore used; and the judgment roll shall, without any writ or return, be brought by the master into the Court of Error in the Exchequer Chamber, before the Justices, or Justices and Barons, as the case may be, of the other two Superior Courts of Common Law on the day of its sitting, at such time as the Judges shall appoint, either in term or in vacation; or if the proceedings in error be before the High Court of Parliament, then before the High Court of Parliament, before or at the time of its sitting; and the Court of Error shall and may thereupon review the proceedings, and give judgment as they shall be advised thereon; and such proceedings and judgment as altered or affirmed shall be entered on the original record; and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original judgment was given.

Judgment roll to be brought into Court instead of transcript.

156. Courts of Error shall have power to quash the proceedings in error in all cases in which error does not lie, or where they are taken against good faith, or in any case in which proceedings in error might heretofore have been quashed by such Courts; and such Courts shall in all respects have such jurisdiction over the proceedings as over the proceedings in error commenced by writ of error.

Jurisdiction of Courts of Error over the proceedings.

157. Courts of Error shall in all cases have power to give such judgment and award such process as the Court from which error is brought ought to have done, without regard to the party alleging error.

Court of Error to have like powers with Court below.

158. Either party alleging error in fact may deliver to one of the masters of the Court a memorandum in writing, in the form contained in the schedule (A.) to this Act annexed, marked

Proceedings in error in fact.

Extracts from Common Law Procedure Act, 1852.

No. 12., or to the like effect, intitled in the Court and cause, and signed by the party or his attorney, alleging that there is error in fact in the proceedings, together with an affidavit of the matter of fact in which the alleged error consists; whereupon the master shall file such memorandum and affidavit, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note and affidavit may be served on the opposite party or his attorney; and such service shall have the same effect, and the same proceedings may he had thereafter as heretofore had after the service of the rule for allowance of a writ of error in fact.

Plaintiff may discontinue proceedings in error.

159. The plaintiff in error, whether in fact or law, shall be at liberty to discontinue his proceedings by giving to the defendant in error a notice, headed in the Court and cause, and signed by the plaintiff in error or his attorney, stating that he discontinues such proceedings; and thereupon the defendant in error may sign judgment for the costs of and occasioned by the proceedings in error, and may proceed upon the judgment on which the error was brought.

Defendant may confess error, and consent to reversal of judgment.

160. The defendant in error, whether in fact or law, shall be at liberty to confess error, and consent to the reversal of the judgment, by giving to the plaintiff in error a notice, headed in the Court and cause, and signed by the defendant in error or his attorney, stating that he confesses the error, and consents to the reversal of the judgment; and thereupon the plaintiff in error shall be entitled to and may forthwith sign a judgment of reversal.

Death of plaintiff in error no abatement.

161. The death of a plaintiff in error after service of the note of the receipt of the memorandum alleging error, with a statement of the grounds of error, shall not cause the proceedings to abate, but they may be continued as herein-after mentioned.

Providing for death of one of several plaintiffs in error.

162. In case of the death of one of several plaintiffs in error, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may be thereupon continued at the suit of, and against the surviving plaintiff in error, as if he were the sole plaintiff.

Proceedings upon death of sole plaintiff or of all the plaintiffs in error.

163. In case of the death of a sole plaintiff or of several plaintiffs in error, the legal representative of such plaintiff or of the surviving plaintiff may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may thereupon be continued at the suit of and against such legal representative as the plaintiff in error; and if no such suggestion shall be made the defendant in error may proceed to an affirmance of the judgment according to the practice of the Court, or take such other proceedings thereupon as he may be entitled to.

Death of defendant in error no abatement.

164. The death of a defendant in error shall not cause the proceedings to abate, but they may be continued as herein-after mentioned.

Extracts from Common Law Procedure Act, 1852.

165. In case of the death of one of several defendants in error, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the proceedings may be continued against the surviving defendant.

Proceedings upon death of one of several defendants in error.

166. In case of the death of a sole defendant or of all the defendants in error, the plaintiff in error may proceed, upon giving ten days notice of the proceedings in error, and of his intention to continue the same, to the representatives of the deceased defendants, or if no such notice can be given, then, by leave of the Court or a Judge, upon giving such notice to the parties interested as he or they may direct.

Proceedings upon death of sole defendant or of all the defendants in error.

Amendment.

And whereas the power of amendment now vested in the Courts and the Judges thereof is insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of form: Be it enacted as follows:

Amendment.

222. It shall be lawful for the Superior Courts of Common Law, and every Judge thereof, and any Judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

Her Majesty may direct all or part of this Act to extend to any Court of Record.

228. It shall be lawful for Her Majesty from time to time, by an Order in Council, to direct that all or any part of the provisions of this Act or of the rules to be made in pursuance thereof shall apply to all or any Court or Courts of Record in England or Wales, and within one month after such order shall have been made and published in the London Gazette such provisions and rules respectively shall extend and apply in manner directed by such order; and any such order may be in like manner from time to time altered or annulled.

17° & 18° VICTORIÆ, CAP. 125.—COMMON LAW PROCEDURE ACT, 1854.

Extracts from Common Law Procedure Act, 1854.

AN ACT for the further Amendment of the Process, Practice, and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham.

(*Sections referred to in the Argument and Judgment.*)

Error may be brought on a special case.

32. Error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the pro-

Extracts from Common Law Procedure Act, 1854.

ceedings for bringing a special case before the Court of Error shall, as nearly as may be, be the same as in the case of a special verdict; and the Court of Error shall either affirm the judgment or give the same judgment as ought to have been given in the Court in which it was originally decided, the said Court of Error being required to draw any inferences of fact from the facts stated in such special case which the Court where it was originally decided ought to have drawn.

Grounds to be stated in rule nisi for new trial.

33. In every rule nisi for a new trial or to enter a verdict or nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein.

If rule nisi refused party may appeal.

34. In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted and then discharged or made absolute, the party decided against may appeal.

Appeal upon rule discharged or absolute.

35. In all cases of motions for a new trial upon the ground that the Judge has not ruled according to law, if the rule to show cause be refused, or if granted be then discharged or made absolute, the party decided against may appeal, provided any one of the Judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or, provided the Court in its discretion think fit, that an appeal should be allowed; provided, that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed.

Courts of Error to be Courts of Appeal.

36. The Court of Error, the Exchequer Chamber, and the House of Lords shall be Courts of Appeal for the purposes of this Act.

Notice of appeal.

37. No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to one of the masters of the Court, within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge.

Bail.

38. Notice of appeal shall be a stay of execution, provided bail to pay the sum recovered and costs, or to pay costs where the appellant was plaintiff below, be given, in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff.

Form of appeal.

39. The appeal herein-before mentioned shall be upon a case to be stated by the parties (and, in case of difference, to be settled by the Court or a Judge of the Court appealed from,) in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the Court of Appeal.

Nule nisi granted on appeal, how disposed of.

40. When the appeal is from the refusal of the Court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal.

Judgment in Court of Appeal.

41. The Court of Appeal shall give such judgment as ought to have been given in the Court below; and all such further pro-

Extracts from Common Law Procedure Act, 1854.

ceedings may be taken thereupon as if the judgment had been given by the Court in which the record orginated.

Powers of Court of Appeal as to costs and otherwise.

42. The Court of Appeal shall have power to adjudge payment of costs, and to order restitution; and they shall have the same powers as the Court of Error in respect of awarding process or otherwise.

General rules may be made by the Judges.

97. It shall be lawful for the Judges of the said Courts, or any eight or more of them, of whom the chiefs of each of the said Courts shall be three, from time to time to make all such general rules and orders for the effectual execution of this Act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be necessary or proper, and for that purpose to meet from time to time as occasion may require; provided that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said Courts or of the Judges thereof to make rules or orders, or otherwise to regulate and dispose of the business therein.

Abstract of Case on appeal to the Court of Exchequer Chamber.

ABSTRACT OF THE CASE ON APPEAL TO THE COURT OF EXCHEQUER CHAMBER.

IN THE EXCHEQUER CHAMBER

BETWEEN

HER MAJESTY'S ATTORNEY GENERAL - *Informant,*

AND

HERMAN JAMES SILLEM, HENRY BERTHON PRESTON, JACOB WILLINK, DAVID WILSON THOMAS, and WILLIAM THOMPSON MANN, claiming the "Alexandra" - *Defendants.*

This is an Appeal from the decision of the Court of Exchequer come to on the 11th day of January in the year of our Lord 1864, and expressed in a Rule of that date, whereby that Court discharged the Rule Nisi hereafter mentioned.

The Information is an Information filed by Her Majesty's Attorney General on the 25th day of May in the year of our Lord 1863 against the ship "Alexandra." The Information alleges in substance that the ship "Alexandra" was forfeited to Her Majesty by reason of certain breaches of the Statute commonly called "The Foreign Enlistment Act," being the Statute 59 George 3. cap. 69., a copy of which accompanies this Case.

The defendants appeared to the Information, and on the 2nd day of June in the year of our Lord 1863 pleaded to the Information. The substance of the defendants' plea is that the ship "Alexandra" was not forfeited by reason of the breaches of the Foreign Enlistment Act alleged in the Information.

Abstract of Case on appeal to the Court of Exchequer Chamber.

Her Majesty's Attorney General replied to this plea on the 9th day of June in the year of our Lord 1863, joining issue thereon.

A copy of the Information is contained in the Appendix to this Case, and is marked A. A copy of the Plea is contained in the Appendix, and is marked B. The cause was tried at the sittings at Westminster after Trinity Term 1863, before the Right Honourable the Lord Chief Baron, on the 22nd, 23rd, 24th, and 25th days of June 1863.

The following is a statement of the evidence given at the trial on behalf of the Attorney General (the defendants having called no witnesses), and of the arguments of counsel in the course of that evidence, and of the ruling of the Lord Chief Baron thereon.

Her Majesty's Proclamation, dated May 13th, 1861, was put in and read (*see* Appendix C.) It was not in dispute that the hostilities mentioned in the Proclamation had continued ever since the date of the Proclamation.

The evidence as given in the Report of the Trial, page 19 *to* 139, *is here set out verbatim.*

On the 5th day of November 1863 the Court made the following Rule Nisi for a new trial:—

IN THE EXCHEQUER.

Thursday, the 5th day of November 1863.

Between Her Majesty's Attorney General, informant, and Hermann James Sillem and others, claiming the "Alexandra," defendants.

By Information of Seizure.

Upon the motion of Sir Roundell Palmer, Knt., Her Majesty's Attorney General, it is ordered by the Court that the said defendants do within a week after service of this Rule, or a copy thereof, show cause to this Court why the verdict found for the defendants upon the trial of this cause before the Right Honourable the Lord Chief Baron of this Court, at the sittings in Middlesex after Trinity term last, should not be set aside, and a new trial of this cause had on the ground—1st, that the verdict was against the evidence; 2nd, that the verdict was against the weight of evidence; 3rd, that the learned Lord Chief Baron did not sufficiently explain to the jury the construction and effect of the Foreign Enlistment Act; 4th, that the learned Lord Chief Baron did not leave to the jury the question whether the ship "Alexandra" was or was not intended to be employed in the service of the Confederate States to cruize or commit hostilities against the United States; 5th, that the learned Lord Chief Baron did not leave to the jury the question whether there was any attempt or endeavour to equip, &c.; 6th, that the learned Lord Chief Baron did not leave to the jury the question whether there was knowingly any aiding, assisting, and being concerned in the equipping, &c.; and 7th, that the learned Lord Chief Baron misdirected the

jury as to the construction and effect of the 7th section of the Foreign Enlistment Act.

W. H. WALTON, Q.R.

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Cause was shown against that Rule on the 17th, 18th, 19th, 20th, 21st, and 23rd days of November 1863. On the 11th day of January 1864 the Court made the following Rule:—

IN THE EXCHEQUER.

Monday, the 11th day of January 1864.

Between Her Majesty's Attorney General, informant, and Hermann James Sillem and others, claiming the "Alexandra," defendants.

By Information of Seizure.

Whereas by a Rule of this Court made in this cause on the 5th day of November last, it was ordered by the Court that the said defendants should, within a week after service of the said Rule, or a copy thereof, show cause to this Court why the verdict found for the defendants upon the trial of this cause before the Right Honourable the Lord Chief Baron of this Court at the sittings in Middlesex after Trinity term last, should not be set aside, and a new trial of this cause had on the ground—1st, that the verdict was against the evidence; 2nd, that the verdict was against the weight of evidence; 3rd, that the learned Lord Chief Baron did not sufficiently explain to the jury the construction and effect of the Foreign Enlistment Act; 4th, that the learned Lord Chief Baron did not leave to the jury the question whether the ship "Alexandra" was or was not intended to be employed in the service of the Confederate States to cruize or commit hostilities against the United States; 5th, that the learned Lord Chief Baron did not leave to the jury the question whether there was any attempt or endeavour to equip, &c.; 6th, that the learned Lord Chief Baron did not leave to the jury the question whether there was knowingly any dng, assisting, and being concerned in the equipping, &c.; 7th, that the learned Lord Chief Baron misdirected the jury as to the construction and effect of the 7th section of the Foreign Enlistment Act. And whereas on the 17th day of November last cause was shown against the said Rule by Sir Hugh Cairns, Knight, one of Her Majesty's Counsel, on behalf of the said defendants, when the matter was adjourned till the 18th day of November last, when further cause was shown against the said Rule by the said Sir Hugh Cairns, and also by John Burgess Karslake, Esq., one other of Her Majesty's Counsel, when the matter was further adjourned till the 19th day of November last, when further cause was shown against the said Rule by the said Mr. Karslake, and also by George Mellish, Esq., one other of Her Majesty's Counsel, and Mr. Kemplay, also of Counsel respectively for the said defendants, after which Sir Roundell Palmer, Knight, Her Majesty's Attorney General, was heard in support of the said

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Rule, when the further hearing was again adjourned till the 20th day of November last, when upon further hearing Her Majesty's said Attorney General in support of the said Rule, the further hearing was again adjourned till the 21st day of November last, when upon hearing Robert Porrett Collier, Esq., Her Majesty's Solicitor General also in support of the said Rule, the further hearing was again adjourned till Monday the 23rd day of November last, when upon hearing Sir Robert Joseph Phillimore, Knight, Her Majesty's Advocate General, John Locke, Esq., one other of Her Majesty's Counsel, and Mr. T. Jones, of Counsel also in support of the said Rule, the matter was adjourned for the judgment of the Court until this day. Now it is ordered by the Court that the said Rule of the 5th day of November last be and the same is hereby discharged.

W. H. WALTON, Q.R.

The document marked C. in the Appendix is a copy of Her Majesty's Proclamation, dated May 13th, 1861. The document marked D. in the Appendix is a copy of the appointment of the witness, Clarence R. Yonge, Assistant Paymaster, referred to by the witness, Clarence R. Yonge, in the course of his evidence, and which was produced and proved on the trial.

The documents marked E., F., G., H., I. are copies of the orders for payment to the witness, Clarence R. Yonge, referred to in his evidence, and which were produced and proved at the trial.

The document marked in the Appendix J. is a copy of the American Foreign Enlistment Act, viz., Act of Congress, chapter 88.

The Attorney General submits that the Rule ought not to have been discharged, but ought to have been made absolute on one or more of the 3rd, 4th, 5th, 6th, or 7th points or grounds of application.

(Signed) FRED. POLLOCK,
Exchequer,
30th January 1864.

The Appendix contained a copy of the Information at length, marked A., of which the following is an abstract:—

IN THE EXCHEQUER.

The 25th of May, A.D. 1863.

Middlesex to wit. } Sir William Atherton, Knight, Attorney General of our Lady the Queen, who prosecutes for Her Majesty in this behalf, informs the Court that heretofore and after the 3rd July, A.D. 1819, and before this 25th May, A.D. 1863, to wit, on the 5th April, A.D. 1863, at Ratcliff, in the county of Middlesex, a certain officer of Her Majesty's Customs, to wit, Edward Morgan, then by law empowered so to do, did seize and arrest to the use of Her Majesty as forfeited a certain ship or

Abstract of Case on appeal to the Court of Exchequer Chamber.

vessel called the "Alexandra," together with the furniture, tackle, and apparel belonging to and on board the said ship or vessel.

1*st Count.*—For that certain persons, to wit, William Cowley Miller, Thomas Miller, Charles Kuhn Prioleau, James Thomas Welsman, Eugene Tessier, James Bulloch, Matthew Butcher, Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, William Thompson Mann, and divers and very many other persons whose names are to the said Attorney General at present unknown, heretofore and before the making of the said seizure, and after the 3rd July, A.D. 1819, and before the 25th May, A.D. 1863, to wit, on the 5th April, A.D. 1863, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpose first had and obtained, *did equip* the said ship or vessel with intent and in order that such ship or vessel should be employed in the service of certain foreign states styling themselves the Confederate States of America, with intent to cruize and commit hostilities against a certain foreign state, with which Her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, the Republic of the United States of America, contrary to the form of the statute in such case made and provided; whereby and by force of the statute in that case made and provided, the said ship or vessel, together with the said tackle, apparel, and furniture, became and was forfeited.

2*nd Count.*—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpose first had and obtained, *did equip* the said ship or vessel, with intent and in order that such ship or vessel should be employed in the service of certain foreign states styling themselves the Confederate States of America, with intent to cruize and commit hostilities against citizens of a certain foreign state, with whom and with which respectively Her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, citizens of the Republic of the United States of America, contrary, &c.

3*rd Count.*—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpose first had and obtained, *did equip* the said ship or vessel, with intent to cruize and commit hostilities against a certain foreign state, with which Her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, the Republic of the United States of America, contrary, &c.

4*th Count*—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, at Ratcliff, in the county of Middlesex, without the leave or licence of Her Majesty for that purpose first had and obtained, *did equip* the said ship or vessel, with intent to cruize and commit hostilities against citizens of a certain foreign state, with whom and with which respectively Her Majesty was not then, to wit, on the day and

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year last aforesaid, at war, to wit, citizens of the Republic of the United States of America, contrary, &c.

5th Count.—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpose first had and obtained, *did equip* the said ship or vessel, with intent and in order that such ship or vessel should be employed in the service of divers and very many persons exercising the powers of government in and over certain foreign states styling themselves the Confederate States of America, with intent to cruize and commit hostilities against a certain foreign state, with which Her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, the Republic of the United States of America, contrary, &c.

6th Count.—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpose first had and obtained, *did equip* the said ship or vessel, with intent and in order that such ship or vessel should be employed in the service of divers and very many persons exercising the powers of government in and over certain foreign states styling themselves the Confederate States of America, with intent to cruize and commit hostilities against citizens of a certain foreign state, with whom and with which respectively Her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, citizens of the Republic of the United States of America, contrary, &c.

7th Count.—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpose first had and obtained, *did equip* the said ship or vessel with intent and in order that such ship or vessel should be employed in the service of divers and very many persons exercising the powers of government over part of a certain foreign people, to wit, part of the people of the United States of America, with intent to cruize and commit hostilities against a certain foreign state, with which Her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, the Republic of the United States of America, contrary, &c.

8th Count.—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpese first had and obtained, *did equip* the said ship or vessel with intent and in order that such ship or vessel should be employed in the service of divers and very many persons exercising the powers of government over part of a certain foreign people, to wit, part of the people of the United States of America, with intent to cruize and commit hostilities against citizens of a certain foreign state, with whom and with which respectively Her Majesty was not then, to wit, on the day and year last aforesaid,

at war, to wit, citizens of the Republic of the United States of America, contrary, &c.

9th *Count*, same as 1st *Count*, substituting "did furnish" for "did equip."

10th	,,	,,	2d	,,	,,	,,
11th	,,	,,	3d	,,	,,	,,
12th	,,	,,	4th	,,	,,	,,
13th	,,	,,	5th	,,	,,	,,
14th	,,	,,	6th	,,	,,	,,
15th	,,	,,	7th	,,	,,	,,
16th	,,	,,	8th	,,	,,	,,

17th *Count*, same as 1st *Count*, substituting "did fit out" for "did equip."

18th	,,	,,	2d	,,	,,	,,
19th	,,	,,	3d	,,	,,	,,
20th	,,	,,	4th	,,	,,	,,
21st	,,	,,	5th	,,	,,	,,
22d	,,	,,	6th	,,	,,	,,
23d	,,	,,	7th	,,	,,	,,
24th	,,	,,	8th	,,	,,	,,

25th *Count*, same as 1st *Count*, substituting "did attempt and endeavour to equip" for "did equip."

26th	,,	,,	2d	,,	,,	,,
27th	,,	,,	3d	,,	,,	,,
28th	,,	,,	4th	,,	,,	,,
29th	,,	,,	5th	,,	,,	,,
30th	,,	,,	6th	,,	,,	,,
31st	,,	,,	7th	,,	,,	,,
32d	,,	,,	8th	,,	,,	,,

33d *Count*, same as 1st *Count*, substituting "did attempt and endeavour to furnish" for "did equip."

34th	,,	,,	2d	,,	,,	,,
35th	,,	,,	3d	,,	,,	,,
36th	,,	,,	4th	,,	,,	,,
37th	,,	,,	5th	,,	,,	,,
38th	,,	,,	6th	,,	,,	,,
39th	,,	,,	7th	,,	,,	,,
40th	,,	,,	8th	,,	,,	,,

41st *Count*, same as 1st *Count*, substituting "did attempt and endeavour to fit out" for "did equip."

42d	,,	,,	2d	,,	,,	,,
43d	,,	,,	3d	,,	,,	,,
44th	,,	,,	4th	,,	,,	,,
45th	,,	,,	5th	,,	,,	,,
46th	,,	,,	6th	,,	,,	,,
47th	,,	,,	7th	,,	,,	,,
48th	,,	,,	8th	,,	,,	,,

Abstract of Case on appeal to the Court of Exchequer Chamber.

49th *Count*, same as 1st *Count*, substituting "did procure to be equipped" for "did equip."

50th	,,	,,	2d	,,	,,	,,
51st	,,	,,	3d	,,	,,	,,
52d	,,	,,	4th	,,	,,	,,
53d	,,	,,	5th	,,	,,	,,
54th	,,	,,	6th	,,	,,	,,
55th	,,	,,	7th	,,	,,	,,
56th	,,	,,	8th	,,	,,	,,

57th *Count*, same as 1st *Count*, substituting "did procure to be furnished" for "did equip."

58th	,,	,,	2d	,,	,,	,,
59th	,,	,,	3d	,,	,,	,,
60th	,,	,,	4th	,,	,,	,,
61st	,,	,,	5th	,,	,,	,,
62d	,,	,,	6th	,,	,,	,,
63d	,,	,,	7th	,,	,,	,,
64th	,,	,,	8th	,,	,,	,,

65th *Count*, same as 1st *Count*, substituting "did procure to be fitted out" for "did equip."

66th	,,	,,	2d	,,	,,	,,
67th	,,	,,	3d	,,	,,	,,
68th	,,	,,	4th	,,	,,	,,
69th	,,	,,	5th	,,	,,	,,
70th	,,	,,	6th	,,	,,	,,
71st	,,	,,	7th	,,	,,	,,
72d	,,	,,	8th	,,	,,	,,

73d *Count*, same as 1st *Count*, substituting "did knowingly aid, assist, and be concerned in equipping" for "did equip."

74th	,,	,,	2d	,,	,,	,,
75th	,,	,,	3d	,,	,,	,,
76th	,,	,,	4th	,,	,,	,,
77th	,,	,,	5th	,,	,,	,,
78th	,,	,,	6th	,,	,,	,,
79th	,,	,,	7th	,,	,,	,,
80th	,,	,,	8th	,,	,,	,,

81st *Count*, same as 1st *Count*, substituting "did knowingly aid, assist, and be concerned in furnishing" for "did equip."

82d	,,	,,	2d	,,	,,	,,
83d	,,	,,	3d	,,	,,	,,
84th	,,	,,	4th	,,	,,	,,
85th	,,	,,	5th	,,	,,	,,
86th	,,	,,	6th	,,	,,	,,
87th	,,	,,	7th	,,	,,	,,
88th	,,	,,	8th	,,	,,	,,

89th *Count*, same as 1st *Count*, substituting "did knowingly aid, assist, and be concerned in fitting out" for "did equip."

90th „ „ 2d „ „ „

91st „ „ 3d „ „ „

92d „ „ 4th „ „ „

93d „ „ 5th „ „ „

94th „ „ 6th „ „ „

95th „ „ 7th „ „ „

96th „ „ 8th „ „ „

97th *Count*.—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpose first had and obtained, did attempt to fit out the said ship or vessel with intent and in order that such ship or vessel should be employed in the service of divers and very many persons exercising the powers of government over part of a certain foreign people, to wit, part of the people of the United States of America, as a transport or store ship, against a certain foreign state with which Her Majesty was not then, to wit, on the day and year aforesaid, at war, to wit, the Republic of the United States of America, contrary, &c.

98*th Count*.—Charges that the same persons, on the same date, within a certain part of the United Kingdom, to wit, Ratcliff, in the county of Middlesex, without any leave or licence of Her Majesty for that purpose first had and obtained, *did equip, furnish, and fit out, and did attempt and endeavour to equip, furnish, and fit out, and did procure to be equipped, furnished, and fitted out, and did knowingly assist and be concerned in the equipping, furnishing, and fittiny out* of the said ship or vessel, with intent and in order that such ship or vessel should be employed in the service of certain foreign states styling themselves the Confederate States of America, and in the service of divers and very many persons exercising and assuming to exercise the powers of government in and over certain foreign states styling themselves the Confederate States of America, and in the service of divers and very many persons exercising and assuming to exercise powers of government over part of a certain foreign people, to wit, part of the people of the United States of America, as a transport or store ship, against and with intent to cruize and commit hostilities against a certain foreign state with which Her Majesty was not then, to wit, on the day and year last aforesaid, at war, to wit, the Republic of the United States of America, and against citizens of a certain foreign state with whom and with which respectively Her Majesty was not then at war, to wit, citizens of the Republic of the United States of America, contrary to the form of the statute in such case made and provided; whereby and by force of the statute in that case made and provided, the said ship or vessel, together with the said tackle, apparel, and furniture, and the materials, arms, ammunitions, and stores belonging to and on board the said ship or vessel, became and were forfeited.

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Wherefore the said Attorney General, on behalf of Her Majesty, prays the consideration of the Court in the premises, and that the said ship or vessel, together with her said furniture, tackle, and apparel, may, for the respective reasons aforesaid severally remain forfeited.

(Signed) WILLIAM ATHERTON.

COPY OF THE PLEA MARKED B.

In the Exchequer.

The second day of June, in the year of our Lord one thousand eight hundred and sixty-three.

Her Majesty's Attorney General and Sillem and others. } And hereupon Hermann James Sillem, Henry Berthon Preston, Jacob Willink, David Wilson Thomas, and William Thompson Mann, who claim the property of the said ship or vessel called the "Alexandra," and the furniture, tackle, and apparel belonging to and on board the said ship or vessel to belong to them, by Edward Lee Rowcliffe, their attorney, appear here in Court, and for plea to the said information say that the said ship or vessel, furniture, tackle, and apparel did not, nor did any or either of them, or any part thereof, become, nor are, nor is the same, or any or either of them, or any part thereof, forfeited for the several supposed causes in the said information mentioned, or for any or either of them, in manner and form as by the said information is charged. And of this the said claimants put themselves upon the country.

Whereupon issue was joined.

Next followed the Queen's Proclamation of 13th May 1861, marked C.

Then warrant appointing Clarence Randolph Yonge, Assistant Paymaster of the "Alabama," marked D.

Then five orders from James D. Bulloch to Messrs. Fraser, Trenholm, and Co., for payment of various sums to Clarence R. Yonge, Assistant Paymaster of the "Alabama," marked respectively E, F, G, H, and I.

And then followed the Act of Congress, chapter 88, commonly known as the *American Foreign Enlistment Act*, marked J.

The British Foreign Enlistment Act, 59 Geo. 3. cap. 69, accompanied the case on appeal.

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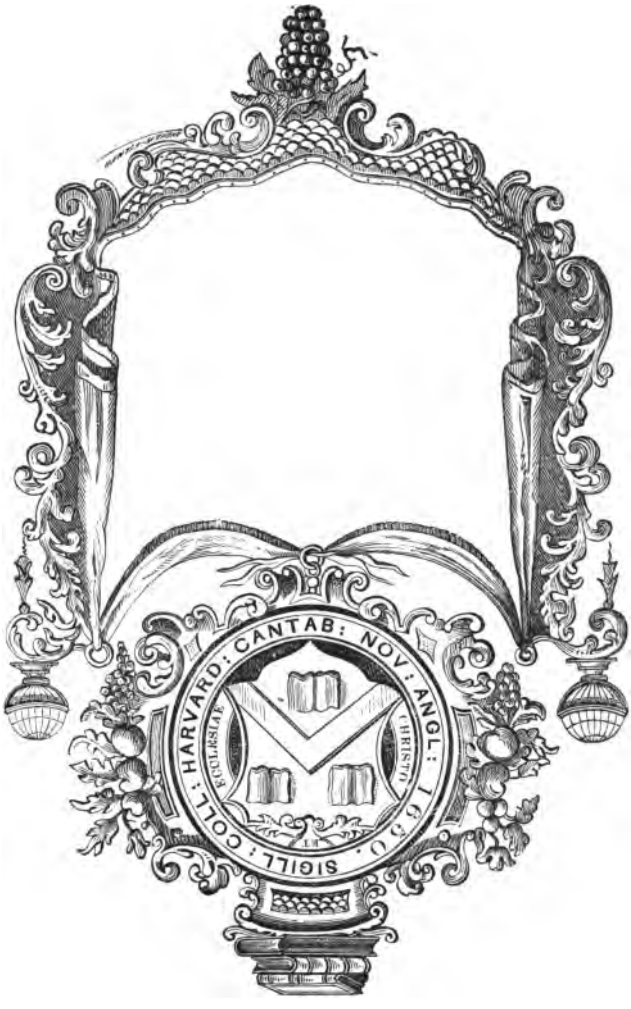
[Wt. —150.—2/64.]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